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THIRD EDITION

1960

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## PREFACE TO THE THIRD EDITION

That the present Edition is not a mere reprint of the previous one which was published a little over a year ago will be evident from the increase in its volume by a hundred pages. Particular attention of the reader may be drawn to the portions relating to the Fundamental Rights and the Writs, with which the practising lawyer is primarily concerned.

For the freshness of its contents, the unreported decisions, such as the Ref. re. Berubari Union (p. 3); *Supdt. v. Ram Manohar* (p. 85); *P.T.C.S. v. R.T.A.* (p. 114); *Yellappagouda v. Basangouda* (p. 232); *Bullion & Grain Exchange v. State of Punjab* (p. 721), will speak for themselves.

A word has to be said about the scope of the present work in view of the comments and queries received from its readers, from time to time. The sole object of this book is to present, within the bounds of a handy volume, a correct statement of the case-law as it stands at the moment of the publication of each of its editions. There is no room for analysing the decisions or to comment on the soundness of any of them. The points decided are stated as they result from the decisions cited, even though the Author may not agree with any of them. A reader who wants to go further must have to refer to the Author's *Commentary on the Constitution of India* which the present work cannot possibly replace.

AUTHOR

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'Our Constitution'	...	...	The Constitution of India.

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# THE CONSTITUTION OF INDIA

WE, THE PEOPLE OF INDIA, having solemnly resolved  
to constitute India into a SOVEREIGN  
Preamble. DEMOCRATIC REPUBLIC and to secure  
to all its citizens :

JUSTICE, social, economic and political ;  
LIBERTY of thought, expression, belief, faith and wor-  
ship ;  
EQUALITY of status and of opportunity ;  
and to promote among them all  
FRATERNITY assuring the dignity of the individual and  
the unity of the Nation ;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth  
day of November, 1949, do HEREBY ADOPT, ENACT AND  
GIVE TO OURSELVES THIS CONSTITUTION.

## PART I

### THE UNION AND ITS TERRITORY

1. (1) India, that is Bharat, shall be a Union of States.

Name and territory  
of the Union. (2) The States and the territories thereof  
shall be as specified in . . . . the First  
Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States ;

(b) the *Union* territories specified in . . . . the First  
Schedule ; and

(c) such other territories as may be acquired.

**Amendment.**—The Article has been amended by the **Constitution  
(Seventh Amendment) Act, 1956**, as follows :

(a) In cl. (2), for the words "the States and their territories", the  
word 'as' has been substituted ; and the words "Parts A, B and C"  
have been omitted.

(b) In cl. (3) (b), the word 'Union' has been inserted before the  
word 'territories' and the words 'Part D of' have been omitted.

**Effects of Amendment.**—In the original Constitution, the States  
which formed the Union of India were classified into three categories  
and enumerated in Parts A, B and C of the First Schedule of the  
Constitution. At the date of the Constitution (Seventh Amendment)  
Act, 1956, the number of these States was 10, 8 and 9 respectively,  
making a total of 27.

Besides these 27 States of different categories, there was another category, viz., a territory specified in Part D of the First Schedule. The Constitution (Seventh Amendment) Act, 1956 has reduced these 4 categories into two only. Instead of three categories of States, there will now be only one class of 'States', and the number of such States after the 'reorganisation' is 14.

The category of 'territory in Part D' has been replaced by 'Union Territories', and this class now includes not only the Andaman and Nicobar Islands which were previously included in Part D, but also some of the erstwhile Part C States. The total number of these Union territories is 6.

### Membership of the Union and the Territory of India.

The Constitution will extend to any territory which comes within the scope of the expression 'territory of India' as defined in cl. (3) of the present Article.

These three categories, as altered by the Constitution (Seventh Amendment) Act, 1956, are—

(a) The 'States', and these are members of the 'Union of States' referred to in cl. (1). These are now 14 in number, viz., Andhra Pradesh, Assam, Bihar, Bombay, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu & Kashmir.

(b) The 'Union territories', being 6 in number, viz., Delhi, Himachal Pradesh, Manipur, Tripura, the Andaman & Nicobar Islands, the Laccadive, Minicoy and Amindivi Islands.

(c) Any territory that may be acquired by India, at any time. Thus, the French Possessions have been acquired by India by agreement with the Government of France and at present these Possessions are being governed as an 'acquired Territory' under the name of Pondicherry.

### Difference in status of the States and Union Territories.

(a) Since the Constitution (Seventh Amendment) Act, 1956, there is no distinction between the 'States' *inter se*. All of them now belong to one class, and all provisions of the Constitution which are applicable to the 'States' are applicable to them alike. Barring Jammu & Kashmir (for which special provisions are maintained), the provisions of Part VI form the Constitution of all States alike.

It is to be noted that the administration of Scheduled Areas, Scheduled Tribes and Tribal Areas as are included within the States are taken out from the operation of the general provisions of Parts VI and VII, and are placed under the Fifth and Sixth Schedules which contain certain self-contained provisions regarding them [Article 244].

(b) The 'Union territories' shall be governed according to the provisions contained in Part VIII, as substituted by the Constitution (Seventh Amendment) Act, 1956. These territories, in short, will be governed, subject to legislation by Parliament, if any, by the President acting through an 'Administrator' appointed by him.

(c) As regards 'acquired territories',—these are included within the definition of 'Union Territories' in Art. 360 (30), *post*. In the result, such territories will also be governed by the provisions in Part VIII.

## 2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Admission or establishment of new States.



### 3. Parliament may by law—

Formation of new States and alteration of areas, boundaries or names of existing States. (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State ;

(b) increase the area of any State ;

(c) diminish the area of any State ;

(d) alter the boundaries of any State ;

(e) alter the name of any State :

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the *area, boundaries or name of any of the States, . . . the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.*<sup>1</sup>

**Amendment.**—The italicised words were substituted by the **Constitution (Fifth Amendment) Act** 1955 in order to put a time limit within which the States are to express their views on any proposal for reorganisation referred to them under Art. 3. By the amendment, the President has been given the power to specify the period at the time of making the reference and also the power to extend the period so specified. If, within the period so specified or extended any State does not express its views, the Bill may be introduced even though the views of that State have not been obtained by the President.

#### 'Parliament may by law'.

The five acts specified in the Article can be done only by legislation by Parliament and not by the Executive without the sanction of Parliament,<sup>2</sup> even though it involves the implementation of a treaty.<sup>4</sup>

#### 'Uniting two or more States.'

Sinha J. of the Calcutta High Court<sup>3</sup> has expressed the view that this clause only authorises a *complete* union of two or more States and that there is no provision in the Constitution enabling two States to unite in *some* matters and maintain their separate existence as regards other matters.

#### 'Diminishing the area of any State'.

The scope of this clause is restricted to inter-State adjustments and does not apply to *cession* of territory in favour of a foreign State.<sup>4</sup>

1. In its application to Jammu & Kashmir, the following further Proviso shall be added to Art. 3—

*"Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the legislature of that State."*

2. *Nirmal v. Union of India*, A. 1959 Cal. 506.

3. *H. C. Sen Gupta v. Speaker*, (1956) 60 C.W.N. 555 (563).

4. *Re Berubari Union*, (1960) S.C. [unreported].

'Bill has been referred'.

1. Once the original Bill is referred to the State or States, the purpose of the Proviso is served, and no fresh reference shall be required every time an amendment to the Bill is moved and accepted, according to the rules of procedure in Parliament.<sup>4</sup>

*Illustration.*

The States Reorganisation Bill, 1956, which had been referred to the Bombay Legislature, proposed for the reorganisation of the State of Bombay into three separate units, namely, (i) Union Territory of Bombay, (ii) State of Maharashtra, (iii) State of Gujerat. But the Act, as passed, provided for a composite State of Bombay, instead of the three separate units. *Held*, the Act did not contravene Art. 3 even though the amendment of the Bill was not referred to the State Legislature at all.<sup>5</sup>

2. Nor is there anything in the Proviso to indicate that Parliament must accept or act upon the views of the State Legislature,<sup>6</sup> if received in time.

4. (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## PART II<sup>1</sup>

### CITIZENSHIP

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and—  
 Citizenship at the commencement of the Constitution. of  
 (a) who was born in the territory of India; or  
 (b) either of whose parents was born in the territory of India; or  
 (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,  
 shall be a citizen of India.

5. *Babulal v. State of Bombay*, A 1960 S.C. 51 (54).

1. This Part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir as from the 26th day of January, 1950.



6. Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

Rights of citizenship of certain persons who have migrated to India from Pakistan.

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

#### **Persons who were Citizens of India at the Commencement of the Constitution.**

The following persons shall be citizens of India at the date of commencement of the Constitution, under Articles 5-8:

I. A person born as well as domiciled in the 'territory of India' (see under Article 1 (3), *ante*)—irrespective of the nationality of his parents [Article 5 (a)].

II. A person domiciled in the 'territory of India', either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [Article 5 (b)].

III. A person who or whose father was not born in the territory of India, but who (a) has his domicile in the 'territory of India', and (b) has been ordinarily residing within the 'territory of India' for not less than 5 years immediately preceding the commencement of the Constitution. In this case also, the nationality of the person's parents is immaterial. Thus, a subject of a Portuguese or French Settlement, residing in India for 5 years preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution [Article 5 (c)].

IV. A person who has migrated from Pakistan, provided—

(i) he or either of his parents or grandparents was born in 'India as defined in the Government of India Act, 1935 (as originally enacted)'; and—

(ii) (a) if he has migrated before July 19, 1948,—he has ordinarily resided within the "territory of India" [see Article 1 (3), *ante*], since

the date of such migration (in this case no registration of the immigrant is necessary for citizenship); or

(b) if he has migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as a citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application [Art. 6].

V. A person who migrated from India to Pakistan after 1st March, 1947, but has subsequently returned to India under a permit issued under the authority of the Government of India for re-settlement or permanent return or under the authority of any law provided he gets himself registered in the same manner as under Article 6 (b) (ii). [Article 7].

VI. A person who, or any of whose parents or grandparents was born in 'India' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India provided he gets himself registered as a citizen of India (whether before or after the commencement of this Constitution), on application in the prescribed form, to the consular or diplomatic representative of India in the country of his residence [Article 8]. So, under this Article, a person, born of Indian parents but residing in Malaya or S. Africa, may acquire Indian citizenship under the Constitution by mere registration at the Indian consulate in that country.

**Whether a corporation can be a citizen of India.**—See under Art. 19, *post*.

**'India' and 'India as defined in the Government of India Act'.**

Throughout the Constitution, the word 'India' means the territory of 'Bharat' as defined in Art. 1, *ante*.

The expression 'India as defined in the Government of India Act, 1935 (as originally enacted)' which is used in Art. 6 (a) or Art. 8 means 'India' as defined in s. 311 (1) of the Government of India Act, 1935, i.e. British India as well as the territory of the Indian States. Part of this territory has since been included in Pakistan.

**Domicile in the territory of India, at the commencement of the Constitution.**

As a result of the creation of the two Dominions of India and Pakistan by s. 1 of the Indian Independence Act, 1947, a person who had his domicile in 'British India' prior to 15-8-47, would automatically acquire the domicile of either India or Pakistan on 15-8-47, unless, of course, he acquired the domicile of some other country outside the ambit of British India, by his choice. Thus, he would acquire domicile of India if he habitually resides within that part of British India which came to be included in the Dominion of India, with the intention of permanently residing there, but not otherwise.<sup>2</sup> A person who continues to reside and carry on business in Pakistan would not acquire Indian domicile by simply sending his family to India, without himself coming to reside in India.<sup>3</sup>

**7. Notwithstanding anything in articles 5 and 6, a**

Rights of citizenship to certain migrants to Pakistan.

citizen of India :

person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a

2. *Attaullah v. Attaullah*, A. 1953 Cal. 530 (533).

3. *Central Bank of India v. Ramnarain*, A. 1955 S.C. 36.



Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.<sup>4</sup>

#### Art. 7: Migration to Pakistan.

1. This Article says that if a person had gone from the territory of India to the territory now included in Pakistan, after 1-3-47, with the intention of shifting his *permanent residence* from India to Pakistan, he would not acquire the citizenship of India which could have accrued to him by his coming within the terms of Art. 5.<sup>5</sup>

#### Illustration.

A had his domicile in the territory of India and he and both his parents were born in India. In 1947, being in Government service, he opted for Pakistan and actually went there after the 1st of March, 1947 and continued to serve under the Government of Pakistan until February, 1948, when he resigned and came back to India.

*Held*, that though A could acquire the citizenship of India under art. 5 (a) or (b), he could not be deemed to be a citizen of India at the commencement of the Constitution because he had migrated to Pakistan within the meaning of art. 7 by reason of his departure from India after having opted for Pakistan after the 1st March, 1947.<sup>6</sup>

2. The Proviso, however, says that even though a person had migrated to Pakistan after 1-3-47, if he returns to India under a permit for resettlement or for permanent return, Indian citizenship would be re-vested in him under Art. 6 (b), as if he had migrated to India after 19-7-48.

#### Arts. 5 and 7.

These two articles have to be read together. In the result—

If a person continued to be in India till 26-1-50 (without any migration before that date) and acquired citizenship of India under Art. 5, he would not lose that citizenship by the fact of migration to Pakistan subsequently, unless it is shown that under Art. 9, he has voluntarily acquired the citizenship of a foreign State.<sup>7</sup>

4. In its application to the State of Jammu & Kashmir, to article 7, there shall be added the following further proviso, namely:

*"Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir who, after having so migrated to the territory now included in Pakistan, returns to the territory of that State under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India."*

5. *Shabbir v. U. P. State*, A. 1952 257.

6. *Aslam v. Fazal*, A. 1959 All. 79.

7. *Mobarik Ali v. State of Bombay*, A. 1957 S.C. 857 (867) : (1958) S.C.R. 328.

On the other hand—

Even though a Muslim wife went to Pakistan (after 1-3-47), leaving her husband in India and so retaining her Indian domicile through her husband, she would lose her Indian citizenship by reason of s. 7, if she fails to prove that she went to Pakistan only for some temporary purpose,<sup>8</sup> returns to India under a permit for permanent return as referred to in the Proviso to Art. 7<sup>9</sup> (as distinguished from a Pakistani passport).<sup>10</sup>

### 'Migration'.

1. The word 'migration' in this Art., when read in the light of the Proviso, indicates going to Pakistan with the "intention of making that place the person's place of abode or residence in future."<sup>11</sup>

2. Departure from India to Pakistan for the purpose of employment or labour<sup>12</sup> constitutes migration. Movement to Pakistan by a Government servant who opted for Pakistan is 'migration' within the meaning of Art. 7.<sup>13</sup>

3. Brevity of residence in Pakistan<sup>14</sup> or that the person acquired no property there while he possessed considerable property in India,<sup>15</sup> are not relevant considerations for determining the question of migration.

4. But a citizen of India would not lose his citizenship by a mere temporary visit to Pakistan on some business or otherwise.<sup>16</sup> But a person who, after moving to Pakistan, subsequently came to India on a temporary permit, representing himself to be a Pakistani national, can hardly claim that he went to Pakistan only for a temporary purpose.<sup>17</sup> The declaration in the permit or passport should be taken as showing his intention.<sup>18</sup> Minor children migrating to Pakistan with their father lose their Indian citizenship with him.<sup>19</sup>

### 'Permit'.

The Influx from Pakistan (Control) Act (XXIII of 1949) provided that no person (subject to some exceptions) shall enter India from any place in Pakistan, whether directly or indirectly, unless he is in possession of 'permit'.<sup>20</sup> The Act was repealed in 1952. Now, it is the Indian Passport Act, 1920, which governs influx from Pakistan as from any other foreign country.

The Proviso would be applicable only if the permit was a valid permit. A permit which was invalid or which has been revoked according to law, cannot attract the Proviso.<sup>21</sup>

8. *State of Bihar v. Amar Singh*, (1955) 1 S.C.R. 1250 (1265) : A. 1955 S.C. 282.

9. *Yakub v. Union of India*, (1958) 62 C.W.N. 589.

10. *Naziranbal v. State*, A. 1957 M.B. 1.

11. *Badruzaman v. The State*, A. 1951 All. 16; *Shabbir v. State of U. P.*, A. 1952 All. 257; *Mangal Saln v. Sharno*, A. 1959 Panj. 175 (179).

12. *Jakab v. Kutch Government*, A. 1951 Kutch 38.

13. *Aslam v. Fazal*, A. 1959 All. 79.

14. *State v. Abdul Hamid*, A. 1957 Panj. 86.

15. *Altair Rahman v. State of M. P.*, A. 1951 Nag. 43.

16. *Nisar v. Union of India*, A. 1958 Raj. 65.

16a. *Abdul v. State of M. P.*, A. 1956 M.B. 250 (252).

17. *Mohammad v. High Commissioner for India*, A. 1951 Nag. 38.



8. Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Rights of citizenship of certain persons of Indian origin residing outside India.

**Date from which registration takes effect.**—See s. 5 (5) of the Citizenship Act, 1955, *post*.

9. No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

Persons voluntarily acquiring citizenship of a foreign State not to be citizens.

#### 'Foreign State'.

See under art. 367 (3), *post*. As matters stand, Pakistan is not a 'foreign State' under the present Art. by reason of the Declaration as to Foreign States Order, 1950, made under Art. 367 (3), read with Art. 392 (3) of the Constitution.

But the words 'foreign State' do not occur in Art. 7 and Art. 9 has no reference to Art. 7.<sup>18</sup> Hence, persons who migrated to Pakistan after 1-3-47 and acquired Pakistan nationality, cannot claim the citizenship of India.<sup>19</sup>

See, in this connection, s. 9 of the Citizenship Act, 1955, *post*.

10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

Continuance of the rights of citizenship.

11. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Parliament to regulate the right of citizenship by law.

#### Law relating to citizenship.

As has been pointed out at the outset, the Constitution does not intend to lay down a permanent or comprehensive law relating to

18. Cf. *Noor Md. v. State*, A. 1956 M.B. 211 (213); *Nazranbai v. State*, A. 1957 M.B. 1 (3).

citizenship of India. The power to enact such law is left to Parliament by the present Articles.

In exercise of this power, *Parliament* has enacted the Citizenship Act (LVII of 1955), making elaborate provisions for the acquisition and termination of citizenship **subsequent to the commencement of the Constitution.**

The provisions of this Act are to be read with the provisions of this Part of the Constitution, in order to get a complete picture of the law of Indian citizenship :

### THE CITIZENSHIP ACT (LVII OF 1955)

*An Act to provide for the acquisition and termination of Indian citizenship.*

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows :—

Short title. 1. This Act may be called the Citizenship Act, 1955.

Interpretation. 2. (1) In this Act, unless the context otherwise requires,—

(a) "a Government in India" means the Central Government or a State Government;

(b) "citizen", in relation to a country specified in the First Schedule, means a person who, under the citizenship or nationality law for the time being in force in that country, is a citizen or national of that country;

(c) "citizenship or nationality law", in relation to a country specified in the First Schedule, means an enactment of the legislature of that country which, at the request of the Government of that country, the Central Government may, by notification in the Official Gazette, have declared to be an enactment making provision for the citizenship or nationality of that country;

Provided that no such notification shall be issued in relation to the Union of South Africa except with the previous approval of both Houses of Parliament;

(d) "Indian consulate" means the office of any consular officer of the Government of India where a register or births is kept, or where there is no such office, such office as may be prescribed;

(e) "minor" means a person who has not attained the age of eighteen years;

(f) "person" does not include any company or association or body of individuals, whether incorporated or not;

(g) "prescribed" means prescribed by the rules made under this Act;

(h) "undivided India" means India as defined in the Government of India Act, 1935, as originally enacted.

(2) For the purposes of this Act, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.

(3) Any reference in this Act to the status or description of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the status or description of the father at the time of the father's



death; and where death occurred before, and the birth occurs after the commencement of this Act, the status or description which would have been applicable to the father had he died after the commencement of this Act shall be deemed to be the status or description applicable to him at the time of his death.

(4) For the purposes of this Act, a person shall be deemed to be of full age if he is not a minor, and of full capacity if he is not of unsound mind.

#### ACQUISITION OF CITIZENSHIP

Citizenship by birth.

3. (1) Except as provided in sub-section (2) of this section, every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth.

(2) A person shall not be such a citizen by virtue of this section if at the time of his birth—

(a) his father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

Citizenship by descent.

4. (1) A person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth:<sup>19</sup>

Provided that if the father of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless—

(a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

(b) his father is, at the time of his birth, in service under a Government of India.

(2) If the Central Government so directs, a birth shall be deemed for the purposes of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.

(3) For the purposes of the proviso to sub-section (1), any male person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution will be deemed to be a citizen of India by descent only.

5. (1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as

Citizenship by registration.

a citizen of India any person who is not already such citizen, by virtue of the Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories:—

(a) persons of Indian origin<sup>20</sup> who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration;

19. Thus, a child born in Pakistan after 26-1-50, to a father who is an Indian citizen under Art. 5, is a citizen of India [*Nazirubai v. State*, A. 1957 M.B. 1].

20. Sub-cl. (a) and (c) are mutually exclusive. Hence, though sub-cl. (a) would include persons of Indian origin in Commonwealth

- (b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India;
- (c) women who are, or have been, married to citizens of India;
- (d) minor children of persons who are citizens of India; and
- (e) persons of full age and capacity who are citizens of a country specified in the First Schedule :<sup>21</sup>

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

*Explanation.*—For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, or any of his grand-parents, was born in undivided India.

(2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

(3) No person who has renounced,<sup>22</sup> or has been deprived<sup>23</sup> of, his Indian citizenship, or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section (1) except by order of the Central Government.

(4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.

(5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b) (ii) of article 6 or article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.

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countries who have not acquired the citizenship of those countries, it will not include those who have become citizens of any such Commonwealth country. Such persons, even though of Indian origin, can be registered only under sub-cl. (e) and not under sub-cl. (a) [*Ghaurul v. State of Rajasthan*, A. 1958 Raj. 172].

21. Sub-cl. (e) can be applied only if the person satisfies the requirements of the definition of 'citizen' in s. 2 (1) (b) and, in deciding this question, it must be seen that the citizenship or nationality law to be taken into consideration satisfies the requirements of s. 2 (1) (c). Since the Government of India has not, so far, made any notification in the official Gazette declaring any enactment of Pakistan to be 'an enactment making provision for the citizenship or nationality of that country', it follows that a citizen of Pakistan cannot claim registration under sub-cl. (e) of s. 5 (1) [*Aslam v. Fazul*, A. 1959 All. 79 (82)]. Under r. 3 of the Rules made under the Citizenship Act, the fact that a person has obtained a passport from the Government of any other country shall be *conclusive* proof of his having voluntarily acquired the citizenship of that country [*Ghaurul v. State of Rajasthan*, A. 1958 Raj. 172]. But r. 3 relates to s. 9 of the Act and the passport cannot, *prima facie*, dispense with the Government of India notification required for the purposes of s. 2 (1) (c) and s. 5 (1) (e).

22. Cl. (3) means that where this clause applies, registration by the Central Government is necessary instead of the Collector (as under cl. (1)). But cl. (3) is applicable only if a person was before a citizen of India and then lost that citizenship by renunciation or deprivation, and not to a person who had never before been a citizen of India [*Aslam v. Fazul*, A. 1959 All. 79 (81)].



6. (1) Where an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provisions of the Third Schedule, grant to him a certificate of naturalisation.

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalisation is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalisation as from the date on which that certificate is granted.

7. If any territory becomes a part of India, the Central Government may, by order notified in the Official Gazette, specify the persons who shall be citizens of India by reason of their connection with that territory; and those persons shall be citizens of India as from the date to be specified in the order.

#### TERMINATION OF CITIZENSHIP

8. (1) If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority; and, upon such registration, that person shall cease to be a citizen of India.

Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.

(2) Where a male person ceases to be a citizen of India under sub-section (1), every minor child of that person shall thereupon cease to be a citizen of India.

Provided that any such child may, within one year after attaining full age, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India.

(3) For the purposes of this section, any woman who is, or has been, married shall be deemed to be of full age.

9. (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires,<sup>23</sup> or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired, the citizenship of another country,<sup>24</sup> shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

23. As to a test of 'conclusive proof' of voluntary acquisition of citizenship of another country, see r. 3 of Sch. III of the Rules framed under the Citizenship Act, 1955 and *Ghaurul v. State of Rajasthan*, A. 1958 Raj. 172 (174).

24. The expression 'another country' includes Pakistan and other Commonwealth countries who are not 'foreign States' for the purposes of Art. 9 [cf. *Mohammad v. State of A. P.*, A. 1957 A.P. 1047 (1053)].

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority,<sup>25</sup> in such manner,<sup>1</sup> and having regard to such rules of evidence, as may be prescribed in this behalf.

10. (1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of article 5 of the Constitution or clause (a) of sub-section (1) of section 5 of this Act shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of India citizenship, if it is satisfied that—

- (a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or
- (b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or
- (c) that citizen has during any war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or
- (d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or
- (e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at any Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which

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25. Under r. 30 (2) under the Act, such authority is the Central Government. A determination by a State Government, in this matter is, accordingly, void [*Mohammad v. Govt. of A. P.*, A. 1957 A.P. 1047]. This does not mean, however, that until the person raises this question, action cannot be taken against him in terms of his visa [*Nasseruddin v. State of A. P.*, A. 1960 A.P. 106].

1. A determination of this question cannot be obtained through a petition under Art. 226 [*Abdul Rahaman v. State of U. P.*, A. 1958 All. 165 (166); *Nasir Ahmed v. Chief Commr.*, A. 1959 Punj. 261 (263)].



it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a chairman (being a person who has for at least ten years held a judicial office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government; and the Central Government shall ordinarily be guided by such report in making an order under this section.

#### SUPPLEMENTAL

11. Every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen of India.

12. (1) The Central Government may, by order<sup>2</sup> notified in the Official Gazette, make provisions on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule.

(2) Any order made under sub-section (1) shall have effect notwithstanding anything inconsistent therewith contained in any law other than the Constitution of India or this Act.

13. The Central Government may, in such cases as it thinks fit, certify that a person, with respect to whose citizenship of India a doubt exists, is a citizen of India; and a certificate issued under this section shall, unless it is proved that it was obtained by means of fraud, false representation or concealment of any material fact, be conclusive evidence that, that person was such a citizen on the date thereof, but without prejudice to any evidence that he was such a citizen at an earlier date.

14. (1) The prescribed authority or the Central Government may, in its discretion, grant or refuse an application under section 5 or section 6 and shall not be required to assign any reasons for such grant or refusal.

(2) Subject to the provisions of section 15, the decision of the prescribed authority or the Central Government on any such application as aforesaid shall be final and shall not be called in question in any court.

2. So long as no such order is made, a Commonwealth citizen cannot, *ipso facto*, claim any of the rights of a citizen of India [*Noor Md. v. State*, A. 1956 M.B. 211 (213)]. Since no such order has so far been made regarding Pakistan, citizens of Pakistan cannot claim any rights of Indian citizenship even though they are Commonwealth citizens [*Nazarbai v. State*, A 1957 M.B. 1 (3)].

15. (1) Any person aggrieved by an order made under this Act by the prescribed authority or any officer or other authority (other than the Central Government) may, within a period of thirty days from the date of the order make an application to the Central order, make an application to the Central Government for a revision of that order :

Revision.  
Provided that the Central Government may entertain the application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) On receipt of any such application under sub-section (1), the Central Government shall, after considering the application of the aggrieved person and any report thereon which the officer or authority making the order may submit, make such order in relation to the application as it deems fit, and the decision of the Central Government shall be final.

16. The Central Government may, by order, direct that any power which is conferred on it by any of the provisions of this Act other than those of section 10 and section 18 shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercisable also by such officer or authority as may be so specified.

17. Any person who, for the purpose of procuring anything to be done or not to be done under this Act, knowingly makes any representation which is false in a material particular shall be punishable with punishment for a term which may extend to six months, or with fine, or with both.

Offences.  
Power to make rules.

18. (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

- (a) the registration of anything required or authorised under this Act to be registered, and the conditions and restrictions in regard to such registration;
- (b) the forms to be used and the registers to be maintained under this Act;
- (c) the administration and taking of oaths of allegiance under this Act, and the time within which, and the manner in which, such oaths shall be taken and recorded;
- (d) the giving of any notice required or authorised to be given by any person under this Act;
- (e) the cancellation of the registration of, and the cancellation and amendment of certificates of naturalisation relating to, persons deprived of citizenship under this Act, and the delivering up of such certificates for those purposes;
- (f) the registration at Indian consulates of the births and deaths of persons of any class or description born or dying outside India;
- (g) the levy and collection of fees in respect of applications, registrations, declarations and certificates under this Act, in respect of the taking of an oath of allegiance, and in respect of the supply of certified or other copies of documents;



- (h) the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases;
- (i) the procedure to be followed by the committees of inquiry appointed under section 10 and the conferment on such committees of any of the powers, rights and privileges of civil courts;
- (f) the manner in which applications for revision may be made and the procedure to be followed by the Central Government in dealing with such applications; and
- (k) any other matter which is to be, or may be, prescribed under this Act.

(3) In making any rule under this section, the Central Government may provide that a breach thereof shall be punishable with fine which may extend to one thousand rupees.

(4) All rules made under this section shall, as soon as may be after they are made, be laid for not less than fourteen days before both Houses of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid.

**19.** (1) The British Nationality and Status of Aliens Acts, 1914 to 1943, are hereby repealed in their application to India.

Repeals.

(2) All laws relating to naturalisation which are in force in any part of India are hereby repealed.

## THE FIRST SCHEDULE

[See sections 2(13)(b) and 5(1) (e)]

A. The following Commonwealth countries :—

1. United Kingdom.
2. Canada.
3. Commonwealth of Australia.
4. New Zealand.
5. Union of South Africa.
6. Pakistan.
7. Ceylon.
8. Federation of Rhodesia and Nyasaland.

B. The Republic of Ireland.

*Explanation.*—In this Schedule, "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland, and includes Channel Islands, the Isle of Man and all Colonies; and "Commonwealth of Australia" includes the territories of Papua and the territory of Norfolk Island.

## THE SECOND SCHEDULE

[See sections 5(2) and 6(2)]

### OATH OF ALLEGIANCE

I, A. B. ....do solemnly affirm (or swear) that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully observe the laws of India and fulfil my duties as a citizen of India.

## THE THIRD SCHEDULE

[See section 6(I)]

## QUALIFICATIONS FOR NATURALISATION

The qualifications for naturalisation of a person who is not a citizen of a country specified in the First Schedule are:—

- (a) that he is not a subject or citizen of any country where citizens of India are prevented by law or practice of that country from becoming subjects or citizens of that country by naturalisation;
- (b) that, if he is a citizen of any country, he has renounced the citizenship of that country in accordance with the law therein in force in that behalf and has notified such renunciation to the Central Government;
- (c) that he has either resided in India or been in the service of a Government in India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application;
- (d) that during the seven years immediately preceding the said period of twelve months, he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than four years;
- (e) that he is of good character;
- (f) that he has an adequate knowledge of a language specified in the Eighth Schedule to the Constitution; and
- (g) that in the event of a certificate of naturalisation being granted to him, he intends to reside in India, or to enter into, or continue in, service under a Government in India or under an international organisation of which India is a member or under a society, company or body of person established in India:

Provided that the Central Government may, if in the special circumstances of any particular case it thinks fit,—

- (i) allow a continuous period of twelve months ending not more than six months before the date of the application to be reckoned, for the purposes of clause (c) above, as if it had immediately preceded that date;
- (ii) allow periods of residence or service earlier than eight years before the date of the application to be reckoned in computing the aggregate mentioned in clause (d) above.

## PART III

## FUNDAMENTAL RIGHTS

*General*

**12.** In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Definition.



### The State in Part III.

The present Article gives an extended meaning to the words 'the State', wherever they occur in Part III of the Constitution. Unless the context otherwise requires, 'the State' will include not only the Executive and Legislative<sup>1</sup> organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'<sup>2</sup>. It includes a Department of the Government.<sup>3</sup>

### 'Other authorities'.

This expression refers to any authority or body of persons exercising the power to issue rules, bye-laws or regulations having the force of law, e.g., a Board having the power to issue statutory rules,<sup>4</sup> or exercising Governmental powers.<sup>5</sup>

But a non-statutory body, having the power to make regulations without the authority of law, is not a 'State'.<sup>6</sup>

### Fundamental Rights—a guarantee against State action.

It has now been settled that the rights which are guaranteed by Arts. 19,<sup>7</sup> 21<sup>8</sup> and 31<sup>9</sup> are guaranteed against State action as distinguished from violation of such rights by private individuals. In case of violation of such rights by individuals, the ordinary legal remedies may be available but not the constitutional remedies.

But where the claim of a private person is supported by a State act, executive or legislative<sup>1</sup>, the person aggrieved may challenge the constitutionality of the State act which supports the private claim.<sup>1</sup>

**Fundamental rights of Government servants.**—See under Art. 309, *post*.

**Fundamental rights of military personnel.**—See Art. 33, *post*.

**Whether a corporation can have fundamental rights.**—See under Art. 19, *post*.

13. <sup>1</sup>(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

Laws inconsistent with or in derogation of the fundamental rights.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made

1. *Kochunni v. State of Madras*, A1959 S.C. 725.

2. *Basheshar v. I. T. Commr.*, A1959 S.C. 149 (158).

3. *Bidl Supply Co. v. Union of India*, (1956) S.C.R. 267 (277) : A1956 S.C. 479.

4. *Nambooripad v. C. D. Board*, A. 1956 T.C. 19 (21).

5. *University of Madras v. Shanta Bai*, A. 1954 Mad. 67.

6. *Surendra v. Central Board*, A. 1957 Raj. 206.

7. *Samdasani v. Central Bank*, (1952) S.C.R. 391 : (1950-51) C.C. 68 : A1952 S.C. 59.

8. *Vidya Verma v. Shivnarain*, (1956) S.C.A. 357 : A1956 S.C. 108.

9. In its application to the State of Jammu & Kashmir, in article 13, references to the commencement of Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e. the 14th May, 1954.

in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

- (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law ;
- (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

**Cl. (1): Existing laws inconsistent with the Constitution.**

This clause provides that all 'laws in force' at the commencement of the Constitution which clash with the exercise of the fundamental rights conferred by Part III of the Constitution shall, to that extent, be void.<sup>10</sup>

1. But this does not make the existing laws which are inconsistent with the fundamental rights void *ab initio*. The entire Part III of the Constitution, including Art. 13 (1), is prospective. Hence, existing laws which are inconsistent with any provision of Part III are rendered void only with effect from the commencement of the Constitution, which for the first time created the Fundamental Rights. The inconsistency referred to in Art. 13 (1), therefore, does not affect transactions past and closed before commencement of the Constitution or the enforcement of rights and liabilities that had accrued under the 'inconsistent laws' before the commencement of the Constitution.<sup>11</sup>

2. On the other hand, it does not mean that an unconstitutional procedure laid down by a pre-Constitution Act is to be followed in respect of 'pending' proceedings or in respect of new proceedings instituted in respect of pre-Constitution rights or liabilities. Just as there is no vested right in any course of procedure, there is no vested liability in matters of procedure, in the absence of any special provision to the contrary.<sup>12</sup>

3. But if the proceedings had been completed or become final before commencement of the Constitution, nothing in the Fundamental Rights Chapter of the Constitution can operate retrospectively so as to affect those proceedings.<sup>13</sup> For the same reason, it is not possible to impeach the validity of that part of the proceedings which had taken place under the 'inconsistent' law, prior to the commencement of the Constitution.<sup>14</sup>

4. The effect of Art. 13 (1) is not to obliterate the inconsistent law from the statute book for all times or for all purposes or for all

10. *Keshavan v. State of Bombay*, (1951) S.C.R. 228 : (1950-1) C.C. 1 : A1951 S.C. 128.

11. *Lachmandas v. State of Bombay*, (1952-54) 2 C.C. 89 : (1952) S.C.R. 710.

12. *Abdul Khader v. State of Mysore*, (1952-54) 2 C.C. 27 : A1953 S.C. 355.

13. *Qasim Razvi v. State of Hyderabad*, (1952-54) 2 C.C. 7 : (1953) S.C.R. 589.



people.<sup>14,15</sup> The effect is that the inconsistent law cannot, since the commencement of the Constitution, stand in the way of exercise of fundamental rights by persons who are entitled to those rights under the Constitution.<sup>14,15</sup> It remains good, even after the commencement of the Constitution, as regards persons who have not been given fundamental rights, e.g., aliens.<sup>16</sup>

(a) It follows, therefore, that if at any subsequent point of time, the inconsistent provision is amended so as to remove its inconsistency with the fundamental rights, the amended provision cannot be challenged on the ground that the provision had become dead at the commencement of the Constitution and cannot be revived by the amendment. All acts done under the law since the amendment will be valid notwithstanding the fact of inconsistency before the amendment.<sup>16</sup>

(b) For the same reason, if the Constitution itself is amended subsequently, so as to remove the repugnancy, the impugned law becomes free from all blemish from the date when the amendment of the Constitution takes place.<sup>17</sup>

#### Constitutionality of pre-Constitution orders.

1. The provisions of Part III of the Constitution having no retrospective effect, any action taken under any law which was valid at the time when such action was taken (i.e., prior to the coming into force of the Constitution) cannot, after the commencement of the Constitution be challenged as unconstitutional on the score of its infringing any of the fundamental rights.<sup>18,19</sup>

On the other hand,—

Where, though the deprivation of the right was made by a pre-Constitution order, the deprivation is continued from day-to-day, the order becomes void owing to contravention of a fundamental right as soon as the Constitution came into force.<sup>21</sup>

#### Illustration.

The owners of a firm were deprived of their right of management by an order of the U. P. Government under s. 3 (f) of the Industrial Disputes Act, 1947. Subsequently, the Government of India sought to accomplish the same object by issuing an order under the Essential Supplies (Temporary Powers) Act, 1946. The order of the Government of India was issued after the coming into force of the Constitution, but the order of the U. P. Government was prior to the Constitution. Nevertheless, the Supreme Court struck down both the orders as contravening Art. 19 (1) (f).<sup>21</sup>

14. *Bhikaji v. State of M.P.*, (1955) 2 S.C.R. 580 (598) : A1955 S.C. 781.

15. *Purshottam v. Desai*, (1955) 2 S.C.R. 887 (904) : A. 1956 S.C. 20.

16. *Behram v. State of Bombay*, (1955) 1 S.C.R. 613 (651) : A. 1955 S.C. 123.

17. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 580 (599) : A. 1955 S.C. 781.

18. *Keshavan v. State of Bombay*, (1951) S.C.R. 228 : A. 1951 S.C. 128 (130).

19. *Pannalal v. Union of India*, A. 1957 S.C. 397 (412).

20. *Nabhirajiah v. State of Mysore*, (1952-54) 2 C.C. 2 : A. 1952 S.C. 339.

21. *Santisarnup v. Union of India*, A. 1955 S.C. 624.

**CL (2): Post-Constitution laws which are inconsistent shall be void ab initio.**

1. This clause provides that any law made by any Legislature or other authority after the commencement of the Constitution, which contravenes any of the fundamental rights included in Part III of the Constitution shall, to the extent of the contravention, be void. An amendment made after the commencement of the Constitution to an existing law will come within the purview of the clause.<sup>22</sup>

2. As distinguished from cl. (1), cl. (2) makes the inconsistent laws void *ab initio*<sup>23</sup> and even convictions made under such unconstitutional laws shall have to be set aside. Anything done under the unconstitutional law, whether closed, completed or inchoate will be wholly illegal and relief in one shape or another has to be given to the person affected by such unconstitutional law.<sup>24</sup>

3. This does not, however, mean that the offending law is wiped out from the statute-book altogether. It remains in operation as regards persons who are *not* entitled to the fundamental right in question (e.g., a non-citizen in respect of a right guaranteed by Art. 19).<sup>25,1</sup>

4. Nor does cl. (2) authorise the Courts to interfere with the passing of a bill on the ground that it would, when enacted, be void for contravention of the Constitution. The jurisdiction of the Court arises when the bill is enacted into law.<sup>2</sup>

#### **'Shall be void'.**

1. This expression occurs both in cls. (1) and (2). It does not appear that an inconsistent law becomes void without any declaration from the Court to that effect. A citizen who is possessed of a fundamental right and whose right has been infringed can apply to the Court for relief upon a declaration that the law is inconsistent with the Constitution. But if a citizen is not possessed of the right, he cannot claim this relief.<sup>26,2</sup>

2. But once a statute is declared invalid for contravention of a fundamental right, the invalidity attaches to the law from (a) the date of commencement of the Constitution in the case of a pre-Constitution law.<sup>3</sup>

#### **The Doctrine of severability.**

1. The words "*to the extent of the inconsistency or contravention*" make it clear that when some of the provisions of a statute become

22. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (469).

23. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (656).

24. *Keshavan v. State of Bombay*, (1951) S.C.R. 228 (256) : (1950-51) C.C. 1 (6) : A. 1951 S.C. 128.

25. *Bhikaji v. State of M.P.*, (1955) 2 S.C.R. 589 (599) : A. 1955 S.C. 781.

1. This proposition has, however, been dissented from by the majority in *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (663), with the observation that, contrasted with cl. (1), cl. (2) of Art. 13 goes to the root of the legislative power and takes away the power of the State to make a law which is inconsistent with a fundamental right. Such law is, accordingly, void *ab initio* and does not survive for any purposes.

2. *Chotey Lal v. State of U.P.*, A. 1951 All. 228.

3. *Keshavan v. State of Bombay*, (1950-51) C.C. 1 (5) : (1951) S.C.R. 228.



unconstitutional on account of inconsistency with a fundamental right, only the repugnant provisions of the law in question shall be treated by the Courts as void, and not the whole statute,<sup>4</sup>—subject, of course, to the doctrine of severability.

2. The doctrine of severability means that when some particular provision of a statute offends against a constitutional limitation, but that provision (*i.e.*, the section or clause) is *severable* from the rest of the statute, only that offending provision will be declared void by the Court and not the entire statute.

3. The test of severability is—

“Whether what remains is so *inextricably bound up* with the part declared invalid that what remains cannot independently survive or, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted at all that which survives without enacting the part that is *ultra vires*.”<sup>5,6</sup>

Thus—

(A) If good and bad provisions are joined together by using the words ‘and’ or ‘or’, and the enforcement of the good provision is not made dependent on the enforcement of the bad one, *i.e.*, the good provision can be enforced even if the bad one cannot be, or had not existed, the two provisions are severable and the good one will be upheld as valid and given effect to.<sup>6,7</sup>

(B) On the other hand, if there is one provision (as distinct from several joined together) and it hits valid objects as well as invalid ones, which cannot be separated *without altering the language* (which is beyond the jurisdiction of the Courts) and is capable of being used for a legal purpose as well as for an illegal one, it is invalid and cannot be allowed to be used even for the legal purpose.<sup>8</sup> In the words of the Supreme Court<sup>9</sup>—

“Where a law purports to authorise the imposition of restrictions on a fundamental right in language *wide enough* to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits as it is not severable. So long as the possibility of its being applied to purposes not sanctioned by the Constitution cannot be ruled out it must be held to be wholly unconstitutional and void.”<sup>10,16</sup>

**Doctrine of severability as applied to legislation which is partly *ultra vires*.**—See under Art. 254, *post*.

**Court’s power and duty to declare a law unconstitutional.**

1. Our Constitution expressly confers upon the Courts the powers of judicial review, and as regards Fundamental Rights, the Court has

4. *Habeeb v. State of Hyderabad*, (1952-54) C.C. 21 : A. 1953 S.C. 287.
5. *State of Bombay v. Balsara*, (1931) S.C.R. 562 : (1950-51) C.C. 308 (322) : A. 1951 S.C. 318.
6. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (277) : (1952) S.C.R. 889.
7. *Ram Manohar v. Superintendent*, A. 1955 All. 193.
8. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (90) : A. 1950 S.C. 27.
9. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594 : A. 1950 S.C. 124 : (1950-51) C.C. 40 (45).
10. *Chintlamrao v. State of M.P.* (1950-51) C.C. 64 (66) : (1950) S.C.R. 759 : A. 1951 S.C. 118.

been, by the present Article, assigned the role of a sentinel on the 'qui vive'. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.<sup>11</sup>

2. In determining the constitutionality of a provision alleged to be violative of a fundamental right, the Court must weigh the real effect and impact thereof on the fundamental right.<sup>12</sup>

3. On the other hand,—

In determining the question of constitutionality of a statute, what the Court is concerned with is the *competence* of the Legislature to make it and not the wisdom or the motives of the Legislature in making it.<sup>13</sup>

4. Once the Supreme Court is *prima facie* satisfied that the Petitioner before it has a fundamental right which is or is likely to be infringed by State action, it becomes the *duty* of the Supreme Court to interfere,<sup>13a</sup> because the right to move the Supreme Court for the enforcement of fundamental rights is itself guaranteed by the Constitution and the Court cannot, accordingly, throw out a petition on grounds such as that the proper writ has not been prayed for or that there is another alternative remedy open to the Petitioner.<sup>13b</sup> In the Author's opinion, the duty of the High Court (under Art. 226) in respect of fundamental rights is identical even though it is not expressly laid down as in Art. 32.

#### When will a Court decide the question of constitutionality of a law.

1. The Court will not enter upon the question of constitutionality of a law if it is possible to dispose of the case and determine the rights of the parties before it, on other grounds.<sup>14</sup>

2. On the same principle,—where the validity of a law is challenged on the ground of contravention of several Articles of the Constitution, the Supreme Court has refused to decide the issues arising out of each of the Articles relied upon if it is possible to dispose of the case with reference to one or some of them.<sup>15</sup>

#### Presumption in favour of constitutionality.

1. The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.<sup>16</sup>

2. The burden of proving all the *facts* which are requisite for the constitutional invalidity is thus upon the person who challenges the constitutionality.<sup>17</sup>

11. *State of Madras v. Row*, (1952) S.C.R. 597 (605).

12. *Re Kerala Education Bill*, A. 1958 S.C. 956 (981).

13. *Sarup Singh v. State of Punjab*, A. 1959 S.C. 860 (864).

13a. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566; *Himmat-lal v. State of M.P.*, (1954) S.C.R. 1122.

13b. *Kochunni v. State of Madras*, A. 1959 S.C. 725 (730).

14. *Lagu v. State of M.B.*, A. 1950 M.B. 81; *Ramaswami v. Madras Board*, A. 1952 Mad. 20.

15. Cf. *Saghir Ahmad v. State of U.P.*, A. 1955 S.C. 728 (742); *Seshadri v. D. M.*, (1955) 1 S.C.R. 686; A. 1954 S.C. 747.

16. *Chitranil Lal v. Union of India*, (1950) S.C.R. 839 (879); A. 1951 S.C. 41.

17. Cf. *Rao Bahadur v. State of V.P.*, (1953) S.C.R. 1188 (1202).



**Who can challenge the constitutionality of a law.**

(i) No one but whose rights are directly affected by a law can raise the question of the constitutionality of that law.<sup>18</sup>

It follows that—

(a) If a person is outside the class that might be injured by the statute, he has no right to complain.<sup>19a</sup>

(b) Where a statute affects *bona vacantia*, there is no person who is competent to challenge the validity of such statute.<sup>19</sup>

(c) Where a statute operates on a contract, *either* party to the contract is entitled to challenge the validity of the statute.<sup>19</sup>

(d) A person who challenges the constitutionality of a statute must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of enforcement of the statute and that the injury complained of is justiciable.<sup>20</sup>

This does not mean that there may not be cases where the mere operation of an enactment is prejudicial to the exercise of a fundamental right of a person. Where an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms, the aggrieved person may at once come to the Court without waiting for the State to take some overt action threatening to infringe his fundamental right.<sup>21</sup>

*Illustration.*

There was a dispute between the Petitioners and Respondents 2-17 as regards property rights. The respondents obtained the help of a private member to introduce a Bill intituled "The Madras Marumakkathayam (Removal of Doubts) Bill, 1955, under which the Petitioners were to be deprived of their interests in *sthanam* properties and the Respondents would get joint property rights. As soon as the Act was passed, the Respondents issued notices and filed suits against the Petitioners to enforce their rights under the Act.

*Held*, that in the circumstances of the case, the infringement of the fundamental right of the Petitioners was complete as soon as the State Legislature enacted the law in support of the respondents' claim and that the Petitioners could apply under Art. 32 forthwith, without waiting for any overt act on the part of the State against the Petitioners.

(iii) A person who is not possessed of a fundamental right cannot challenge the validity of a law on the ground that it is inconsistent with a fundamental right.<sup>22</sup>

(iv) A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the share-holders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the share-holders have been affected by the impugned statute.<sup>23</sup>

But it may happen that while a statute infringes the fundamental rights of a company, it indirectly affects the interests of its share-

18. *Chitrangit Lal v. Union of India*, (1950) S.C.R. 869.

18a. *Isher Singh v. Union of India*, A. 1956 Punj. 19.

19. *Bombay Dyeing v. State of Bombay*, A. 1958 S.C. 328 (339) : (1958) S.C.R. 1122.

20. *Dwarkanadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674 (712).

21. *Kochunni v. State of Madras*, A. 1959 S.C. 725 (731).

22. *Nabhirajiah v. State of Mysore*, (1952-54) 2 C.C. 2 (5) : (1952) S.C.R. 744 : A. 1952 S.C. 339.

holders; in such a case, the share-holders also can impugn the constitutionality of the statute.<sup>23</sup>

### Whether a fundamental right can be waived.

The question whether a fundamental right can be waived has not yet been finally decided by the Supreme Court.

(a) In *Behram v. State of Bombay*,<sup>24</sup> Venkatarama, J. had expressed the view that such of the rights as were created for the benefit of individuals (as distinguished from the interests of the public) could be waived and, according to his Lordship, even a right guaranteed by Art. 19 (1) came within this category.

But the majority, on reference (Mahajan, C.J., Mukherjea, Bose and Hasan, JJ.) *without finally deciding the question*, expressed the view that the fundamental rights, though primarily for the benefit of individuals, have been put into our Constitution on grounds of public policy and in pursuance of the objective declared in the Preamble. Hence, none of them can be waived.

(b) In *Bashesar v. Commr. of I. T.*,<sup>25</sup> Bhagwati and Subba Rao, JJ. have held that a fundamental right being in the nature of a prohibition addressed to the State, none of the fundamental rights in our Constitution can be waived by an individual. [This view is thus in agreement with the majority view in *Behram's case*<sup>24</sup>].

Das, C.J. and Kapur, J. agreed with the above view only in respect of the right conferred by Art. 14 and refrained from making any observation as regards the other rights in Part III of our Constitution.

S. K. Das, J. opined that where a fundamental right is intended primarily for the benefit of an individual, it can be waived by him, but his Lordship did not enumerate those of the rights included in Part III which would come under this category.

The views expressed in *Behram's case* being *obiter*, and the decision in *Bashesar's case* not being comprehensive, a direct decision is yet to be made.

The view of S. K. Das, J. is in accord with the American view but if this view is acceptable to a future Court, a classification of all the fundamental rights enumerated in Part III shall have to be undertaken, in order to settle the controversy.

### Effect of Acquiescence.

1. There are cases<sup>1,2</sup> in which it has been held that a person who has received a benefit under a statute is not entitled to challenge its constitutional validity.

2. In *Nain Sukh v. State of U. P.*,<sup>3</sup> the Supreme Court observed that a person who had acquiesced in an election being conducted on the basis of separate electorates formed on communal lines, could not seek his remedy under Art. 32, after the election was over.<sup>4</sup>

23. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

24. *Behram v. State of Bombay*, (1955) 1 S.C.R. 613 : A. 1955 S.C. 123.

25. *Bashesar v. Commr. of I. T.*, A. 1959 S.C. 149.

1. *Venkatasubbardo v. Ramakrishna*, A. 1958 A.P. 322.

2. *Narayana v. State of Andhra*, A. 1959 A.P. 471 (475).

3. *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184 : A. 1953 S.C. 384.

4. It should be noted that in this case the writ prayed for was *quo warranto*, with respect to which acquiescence is a good plea in bar, under English common law.



3. But a fundamental right cannot be lost merely on the ground of non-exercise of it.<sup>5</sup>

### Effect of a law being declared unconstitutional.

(i) Art. 141 of our Constitution declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Once, therefore, the Supreme Court declares a law to be unconstitutional, the decision becomes binding on all courts within the territory of India. The virtual effect of it is that that decision operates as a judgment *in rem* against all persons who may seek relief in any Court in India subsequently. In a subsequent proceeding, therefore, there is no onus on the party affected by the unconstitutional law to establish its unconstitutionality again. The Court is bound to ignore the law which has been declared invalid by the Supreme Court, as if it never existed.<sup>6</sup>

(ii) The same principle applies where a law has been declared to be unconstitutional *partially* (e.g., where part of a section has been declared to be invalid). If the law is sought to be enforced in a subsequent case, no notice is to be taken by the Court of that part which has been declared by the Supreme Court to be unconstitutional; in other words, the Court will read the statute as if the part of the section which has been declared to be invalid were not there. If, therefore, a person is prosecuted for contravention of the section a part of which has been declared invalid, no onus is cast on the accused to prove that his case falls under that part of the section which has been held unenforceable; on the other hand, the prosecution cannot succeed unless it proves that the accused has contravened that portion of the section which is enforceable and valid after the Supreme Court decision.<sup>7</sup>

(iii) In the application of the above principles, no distinction can be made between a case where the law is declared to be invalid for lack of legislative competence and a case where it is declared invalid on the ground of contravention of a Fundamental Right. Art. 245 (1) of our Constitution lays down specifically that the legislative power whether of the Union or of a State Legislature is subject to the other provisions of the Constitution. The result is, when a legislature makes a law contravening a Fundamental Right, the position is the same as if it had no power to legislate over the subject-matter of the legislation at all and, accordingly, the declaration of invalidity of the law by the Supreme Court goes to the root of the legislative power in either case.<sup>8</sup>

### Effects of constitutional amendment upon an unconstitutional statute.

There has been a sharp difference of opinion in the Supreme Court, on this point:

I. In *Bhikaji v. State of M. P.*,<sup>9</sup> a unanimous Court [*Das A. C. J.*, *Bhagwati*, *Venkatarama Aiyar*, *Imam & Ayyar JJ.*] laid down the following propositions:

1. The American doctrine that "a statute void for an unconstitutionality is dead and cannot be vitalised by a subsequent amendment

5. Kerala Education Bill, in re, A. 1958 S.C. 956.

6. *Behram Khurshed v. State of Bombay*, (1955) S.C.A. 1 (10): A. 1955 S.C. 123.

7. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (663).

8. *Bhikaji v. State of M.P.*, (1955) 2 S.C.R. 589: A. 1955 S.C. 781. [The observation to the contrary effect made by Mukherjee, J., in *Saghir Ahmad v. State of U.P.*, (1955) 1 S.C.R. 707 (728), was explained away in *Bhikaji's* case on the ground that the question was not raised in *Saghir Ahmad's* case].

of the Constitution" does not apply to laws which become void under Art. 13, for, under Art. 13, the offending statute is not wiped out of the statute-book altogether, but becomes void only for the purpose of the exercise of fundamental rights to person who are entitled to such rights. In the result, as soon as the fundamental right is taken away by a subsequent amendment, the offending statute becomes revived and enforceable for all persons and against all persons with effect from the date when the constitutional amendment comes into force.<sup>8a</sup>

2. A distinction is to be drawn between the two classes of cases where a Court can declare a law as unconstitutional :

(a) Where the enactment was beyond the legislative competence of the Legislature which made it. In such a case, the law is altogether void and a subsequent amendment of the Constitution, conferring the power on the Legislature cannot revive the void law.

(b) On the other hand, where a law is constitutional on the ground of that existence of a constitutional limitation, such as contravention of a fundamental right, the law may be revived by the removal of that limitation by an amendment of the Constitution,—with effect from the date when the amendment comes into force.<sup>9</sup>

II. But the above propositions have been dissented from, so far as *post-Constitution* laws are concerned, by a majority of three Judges [Subba Rao, Bhagwati<sup>10</sup> and Wanchoo, JJ.] in *Deep Chand v. State of U. P.*,<sup>11</sup> on the following grounds,—

(a) In view of art. 13 (2), the fundamental rights constitute express limitations upon the legislative power of a Legislature making a law after the commencement of the Constitution and no distinction can be drawn between a *post-Constitution* law which is *ultra vires*, i.e., beyond the legislative competence of the Legislature and a law which contravenes a fundamental right.<sup>12</sup>

(b) In the result, a *post-Constitution* law, which violates a fundamental right is void *ab initio* and no subsequent amendment of the Constitution can revive such law.

The doctrine of 'eclipse' can be invoked in the case of a *pre-Constitution* law which was valid when it had been enacted, but a shadow was cast by a supervening event, namely, inconsistency with the Constitution which came into existence subsequently; if and when the shadow is removed, the *pre-Constitution* law becomes free from all infirmity. But this principle cannot be invoked in the case of a *pre-Constitution* law which is void *ab initio*.<sup>13</sup>

#### Power of the Legislature when a law is declared unconstitutional.

When a statute is declared unconstitutional by a Court, the Legislature cannot directly override that decision and pronounce the statute to have been valid or anything done under that statute to have been valid on the date of that judgment. It is, however, competent for the Legislature to pass a new law or amend the existing law, removing the unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions.<sup>14</sup>

8a. *Bhikaji v. State of M.P.*, (1955) 2 S.C.R. 589.

9. Bhagwati, J., who was a party to the previous decision, simply concurred in the judgment delivered by Subba Rao, J.

10. *Deep Chand v. State of U. P.*, A. 1959 S.C. 649.

11. *Sadasib v. State of Orissa*, (1956) S.C.R. 43.



**Cl. (3) (a): 'Law'.**

1. Law, in this Article, means the law made by the Legislature in exercise of its power of ordinary legislation and does not include amendments to the Constitution made in exercise of the power under Art. 368<sup>12</sup>. It includes *intra vires* statutory orders<sup>13</sup> and orders made in exercise of power conferred by statutory rules;<sup>14</sup> but not administrative orders having no statutory sanction.<sup>15</sup>

2. This does not, however, mean that an administrative order which offends against a fundamental right will, nevertheless, be valid because it is not a 'law' within the meaning of Art. 13 (3).<sup>16</sup>

3. In view of the present definition, a rule, order or notification issued under a statute may be held invalid for contravention of a fundamental right even though the statute under which it was issued may not offend against the Constitution.<sup>17, 18</sup>

**Sub-clause (b): 'Laws in force'.**

1. This expression is defined in the present clause in the identical language used in the definition of the expression given in Expl. I to Art. 372. Hence, the expression should receive the same expression in both Articles. There is no material difference<sup>19</sup> between 'existing law' as defined in Art. 366 (10) and 'law in force'.

2. By reason of the word 'includes', the definition should be treated as *not* exhaustive, and would, therefore, include not only laws made by the Indian Legislatures, but also pre-Constitution statutes made by the British Parliament,<sup>20</sup> English rules of common law as applied to India,<sup>21</sup> subordinate legislation such as order, by-law, rule, regulation, notification, as well as personal law,<sup>22</sup> custom or usage having the force of law<sup>23</sup> [Cl. 3 (a)].

**Conditions of validity of subordinate legislation.**—See under Art. 245, *post*.

**Constitutionality of some Rules, Orders, Notifications, Bye-Laws.**

**Ajmer Law Regulation, 1877 :**

*Held*.—R. 1 framed under the Act void for contravention of Art. 19 (1) (g).<sup>24</sup>

**Coir Industry Act, 1953 :**

*Held*.—Rr. 18, 19, 20 (1)(a), 21, 22(a) do not contravene Art. 19 (1) (g).<sup>25</sup> or Art. 14.<sup>26</sup>

12. *Shankariprasad v. Union of India*, (1952) S.C.R. 89.
13. *Bidl Supply Co. v. Union of India*, (1956) S.C.R. 267 (277).
14. *State of M.P. v. Mandawar*, (1954) S.C.R. 599 (604) : A. 1954 S.C. 493.
15. *Dwarkanath v. State of Bihar*, A. 1959 S.C. 249 (253).
16. *More v. Union of India*, A. 1959 Bom. 134 (137).
17. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 : (1959) S.C.R. 279.
18. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735 : A. 1955 S.C. 25.
19. *In re Menon*, A. 1953 Mad., 729.
20. *Cf. United Provinces v. Aliqa*, A. 1941 F.C. 16 (31).
21. *Esra v. The State*, A. 1953 Cal. 263 (775); *Bajnath v. Ramnath*, A. 1951 H.P. 32.
22. *Ganapati v. State of Ajmer*, A. 1955 S.C. 188 : (1952-54) 2 C.C. 267.
23. *Sivaraman v. Union of India*, A. 1959 S.C. 556 (559).

**Cotton Control Order, 1950:**

*Held.*—Cl. 4 does not contravene Art. 19 (1) (g).<sup>24</sup>

**District Board, Muzaffarnagar :**

*Held.*—Bye-law no. 2 void for contravention of Art. 19 (1) (g).<sup>25</sup>

**Exports (Control) Order, 1959.**

*Held.*—Cl. 7 does not contravene Art. 14.<sup>3</sup>

**Government of C. P. & Berar :**

*Held.*—Resolution, d. 16-9-48, does not contravene Art. 14.<sup>3</sup>

**Government of Bombay, Education Department Circular Order, dated 6-1-54:**

*Held.*—Void for contravention of Arts. 29 (1), 30 (1).<sup>2</sup>

**Madras Communal G.O. :**

*Held void.*<sup>4</sup>

**Madras G. O. 416, Education, dated 24-2-39:**

*Held void.*<sup>5</sup>

**Motor Vehicles Act, 1939:**

*Held.*—R. 268, framed by Madras Government, does not contravene Art. 19 (1) (g).<sup>6</sup>

**Municipal Board, Koirana :**

*Held void.*—Bye-laws 2, 4.<sup>7</sup>

**Non-Ferrous Metal Control Order, 1958:**

*Held valid.*<sup>8</sup>

**Railway Services (Safeguarding of National Security) Rules, 1949 :**

*Held.*—Does not contravene Art. 14.<sup>9</sup>

**Rajasthan Foodgrains Control Order, 1949:**

*Held.*—Cl. 25 void for contravention of Art. 19 (1) (g).<sup>9</sup>

**Regional Transport Authority, Calcutta :**

*Held.*—Notification, d. 13-5-52 does not contravene Art. 19 (1) (g).<sup>10</sup>

24. *M. B. Cotton Association v. Union of India*, A. 1954 S.C. 634.

25. *Tahir Hussain v. Dt. Board*, A. 1954 S.C. 630 : (1952-54) 2 C.C. 234.

1. *Venkatkrishnan, in re*, A. 1958 Mad. 218.

2. *State of M.P. v. Mandwar*, A. 1954 S.C. 493.

3. *State of Bombay v. Education Society*, (1955) 1 S.C.R. 568.

4. *State of Madras v. Champakan*, (1951) S.C.R. 525 : (1950-1) C.C. 183;

*Venkataraman v. State of Madras*, A. 1951 S.C. 229 : (1950-1) C.C. 37.

5. *Ramakrishnaiah v. Dt. Board*, A. 1952 Mad. 253.

6. *Ibrahim v. R. T. A.*, (1953) S.C.R. 290 : A. 1953 S.C. 79.

7. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

7a. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

8. *Balakotiah v. Union of India*, A. 1958 S.C. 232.

9. *State of Rajasthan v. Nathmal*, (1954) S.C.R. 982 : (1952-54) 2 C.C. 239.

10. *Harnam Singh v. R. T. A.*, (1954) S.C.R. 371 : A. 1954 S.C. 140.



**Sugar (Control) Order, 1955:**

*Held valid.*—Notification, d. 30-7-58, under cl. (5).<sup>11</sup>

**Town Area Committee, Jalalabad :**

*Held.*—Bye-laws 1, 4 (b) do not contravene Art. 19 (1), (g).<sup>12</sup>

**U.P. Coal Control Order, 1953:**

*Held.*—Cls. 3 (2) (b); 4 (3) contravene Art. 19 (1) (g).<sup>13</sup>

**U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953.**

*Held.*—Notification, dated 27-9-54, does not contravene Art. 19 (1)(c).<sup>14</sup>

*Right to Equality*

**14.** The State shall not deny to any person equality before  
Equality before the law or the equal protection of the laws  
law. within the territory of India.

**What 'equal protection' means.**

Equal protection means the right to equal treatment in *similar circumstances*<sup>15</sup> both in the privileges conferred and in the liabilities imposed by the law.<sup>16</sup> In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same.<sup>17</sup>

But,—

(i) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position, as the varying needs of different classes of persons often require separate treatment.<sup>18, 19</sup>

The principle does not take away from the State the power of classifying persons for legitimate purposes.<sup>17, 19</sup>

"A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."<sup>20</sup>

(ii) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.<sup>19</sup>

Differential treatment does not 'per se' constitute violation of Art. 14. It denies equal protection only when there is no *reasonable* basis for the differentiation.<sup>20</sup>

11. *D. S. & G. Mills v. Union of India*, A. 1959 S.C. 626 (632).

12. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

13. *Dwarka Prasad v. State of U.P.*, (1954) S.C.R. 803.

14. *Tika Ramji v. State of U.P.*, A. 1956 S.C. 676 (711).

15. *Shrikishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

16. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (320), Mukerjee

J.

17. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (17) : (1950) S.C.R. 869.

18. *Dhirendra v. Legal Remembrancer*, (1952-54) 2 C.C. 111 (114) : (1955) 1 S.C.R. 224 : A. 1954 S.C. 424.

19. *State of Bombay v. Balsara*, (1951) S.C.R. 682 (708-9) ; (1950-51) C.C. 10 (308).

20. *Ameeroonissa v. Mehboob*, (1953) S.C.R. 404 (414) : (1952-54) 2 C.C. 117 : A. 1953 S.C. 91.

(iii) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.<sup>20a</sup> Legislation enacted for the achievement of a particular object or purpose need not be all-embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of Art. 14.<sup>21</sup>

(iv) Art. 14 does not prevent the Legislature from introducing a reform gradually, that is to say, at first applying the legislation to some of the institutions<sup>22</sup> or objects<sup>23</sup> having common<sup>22</sup> or particular areas<sup>24</sup> only, according to the exigencies of the situation.

#### Classification authorised by other provisions of the Constitution.

1. Art. 14 is a general provision and has to be read subject to the other provisions included within the Part on Fundamental Rights. Hence, any law making special provision for women (or children) under Art. 15 (3) cannot be challenged on the ground of contravention of Art. 14.<sup>25</sup>

Thus, s. 54 (4) of the Representation of the People Act, 1951, which confers a double advantage upon members of the Scheduled Castes or Tribes to be returned to the general seats even though seats have been reserved for them under the Constitution, being sanctioned by Art. 15 (4), cannot be held to be void for contravention of Art. 14.<sup>1</sup>

2. The special treatment of Government servants in the matter of their tenure [Art. 310(1)]<sup>2</sup>; or an order made by the President under Art. 311 (2), Proviso (c)<sup>3</sup> cannot be challenged as violative of Art. 14.

#### How far reasonableness may be determined with reference to other laws.

1. For the purpose of application of Art. 14, laws made by different Legislatures *cannot* be taken together for the purpose of comparison or contrast to show that the provisions of the one are discriminatory when read with the provisions of the other. Each law must be dealt with specifically.<sup>4</sup>

2. Of course, when the same Legislature enacts a number of connected laws, their combined operation may be taken into consideration for determining whether the provisions of any one of them are discriminatory. But the same process cannot be applied where similar laws on the same subject are enacted by different Legislatures.<sup>5</sup>

20a. *State of Bombay v. Balsara*, (1951) S.C.R. 682 (708-9).

21. *Sakhwant v. State of Orissa*, (1955) 1 S.C.R. 1004: (1952-4) 2 C.C. 155 (156).

22. *Lakshmindra v. Commr.*, A. 1952 Mad. 613.

23. *Biswambhar v. State of Orissa*, (1954) S.C.R. 842 (845); *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (366).

24. *Ramchandra v. State of Orissa*, (1956) S.C.R. 28; *Karam Das v. Union of India*, (1956) S.C. (unreported).

25. *Yusuf v. State of Bombay*, (1954) S.C.R. 930.

1. *Giri v. Dora*, A. 1959 S.C. 1318 (1325).

2. *Rajkishore v. State of U.P.*, A. 1954 All 343.

3. *Jagadish v. Accountant-General*, A. 1958 Bom. 283.

4. *State of M.P. v. Mandawar*, (1952-54) 2 C.C. 127 (140): A. 1954 S.C. 493.



### What classification is reasonable.

1. As has been already stated, what Art. 14 prohibits is class legislation and not reasonable classification for the purposes of legislation.<sup>6</sup> If the Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a 'well-defined class', it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.<sup>7, 8</sup>

2. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.<sup>9, 10</sup> The classification may be founded on different bases; such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a *nexus* between the basis of classification and the object of the Act under consideration.<sup>11, 12</sup>

3. (a) Article 14 does not insist that legislative classification should be *scientifically perfect* or *logically complete*.<sup>13</sup>

(b) A classification may be reasonable even though a single individual (or object) is treated as a class by himself (or itself), if there are some special circumstances or reasons applicable to him (or it) alone and not applicable to others.<sup>14, 15</sup>

### Illustration.

Section 3 (1) of the Commissions of Enquiry Act, 1952, provides as follows,—

"The appropriate Government may if it is of opinion that it is necessary so to do, . . . . by notification in the Official Gazette, appoint a Commission of Enquiry for the purposes of making an enquiry into any definite matter of public importance and performance of such functions and within such time as may be specified in the notification . . . ."

In exercise of this power, the Government of India issued a notification appointing a Commission of Enquiry to enquire into and report on the administration of the affairs of the Company promoted by Ramkrishna Dalmia and others, stating in the preamble of the notification that such inquiry was of a definite public importance in view of certain gross irregularities in the management of the Company resulting in considerable loss to the investing public which had come to the notice of Government. Both the provisions in the statute as well as the notification issued thereunder were impugned as contravening Art. 14.

The Supreme Court negated both these contentions,—

(i) As regards the provision in the Act, it was held that it did not confer any unguided discretionary power upon the Government but

5. *Budhan v. State of Bihar*, (1955) 1 S.C.R. 1045 (1049) : (1952-54) 2 C.C. 157; A. 1955 S.C. 191.

6. *State of W.B. v. Anwar Ali*, (1952) S.C.R. 284.

7. *Sakhawant v. State of Orissa*, (1955) 1 S.C.R. 1004.

8. *Hanif v. State of Bihar*, A. 1958 S.C. 731.

9. *Kedar Nath v. State of W.B.*, (1952-54) 2 C.C. 100 : A. 1953 S.C. 404 : (1954) S.C.R. 30.

10. *Chiranjit v. Union of India*, (1950) S.C.R. 869 : A. 1951 S.C. 41.

11. *Ramkrishna Dalmia v. Tendolkar*, (1950) S.C.R. 279 : A. 1958 S.C. 538.

that the discretion was to be exercised according to the policy laid down in the section, that is, "for the purpose of making an enquiry into any definite matter of public importance", and the fact that it could be applied against particular individuals did not vitiate the statutory provisions inasmuch as a reasonable basis of classification was provided by the Legislature.

(ii) As regards the notification, it was held by the Supreme Court that the fact that it was applied against named individuals did not vitiate the notification inasmuch as the classification was made by the Government in conformity with the basis of classification provided by the Legislature, namely, the existence of a definite matter of public importance and that it could not be stated that the act and conduct of individual persons can never be regarded as definite matters of public importance. The Central Government had in this case appointed investigators to scrutinise the affairs of the petitioner Company and honestly came to the conclusion that the act and conduct of the petitioner and the affairs of the Company constituted a definite matter of public importance which required a full inquiry. Since the discretion was thus honestly exercised and in conformity with the policy laid down by the statute, the notification could not be struck down under Art. 14 even though it was applied against particular individuals.<sup>12</sup>

(c) The difference which will warrant a reasonable classification need not be great. What is required is that it must be real and substantial and must bear some just and reasonable relation to the object of the legislation.<sup>12-14</sup>

4. When a law is challenged as offending against equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation.<sup>15</sup> Mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the Legislature has in view.<sup>16-17</sup>

#### *Illustration.*

When the Legislature enacts a statutory presumption in respect of certain acts or a burden of proof upon certain persons, the statute cannot be challenged as discriminatory if the rule of evidence has a rational relation to the object to be achieved by the Act.<sup>18,19</sup>

5. When, therefore, a law is challenged as offending against the guarantee in Art. 14, the first duty of the Court is to examine the purpose and policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which

12. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (549-551).

13. *Baburao v. State of Bombay Housing Board*, (1952-54) 2 C.C. 126.

14. *Amteeroonissa v. Mahboob*, (1952-54) 2 C.C. 117 : (1953) S.C.R. 404.

15. *Suraj Mall v. Biswanath*, (1952-54) 2 C.C. 141 : A. 1953 S.C. 545.

16. *State of W. B. v. Anwar Ali*, (1952-54) 2 C.C. 50 : (1952) S.C.R. 284 : A. 1952 S.C. 75.

17. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538.

18. *Babulal v. Collector of Customs*, (1957) S.C.R. 1110 (1122) : A. 1957 S.C. 877.

19. *Krishna v. State of Madras*, (1957) S.C.R. 399 (414).



the Legislature seeks to obtain.<sup>20</sup> The purpose or object of the Act is to be ascertained from an examination of its 'title, preamble and provisions'.<sup>20</sup>

6. A law which was non-discriminatory at its inception may be rendered discriminatory by reason of external circumstances which take away the reasonable basis of classification. This happened after the merger of different territories with differential laws and a number of Indian State laws have been held to be discriminatory since the commencement of the Constitution, on the ground that these laws differed from the laws which governed the rest of the territory of the State with which the Indian States in question merged.<sup>21-22</sup>

#### Reasonable basis of classification.

It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. It depends on the objects of the legislation in view and whatever has a reasonable relation to the *object* or *purpose* of the legislation is a reasonable basis of classification of the objects coming under the purview of the enactment.

Thus—

(a) The basis of classification may be *geographical*.<sup>23, 24</sup>

#### Illustrations.

1. The introduction of the system of trial by jury in certain districts only by notification under s. 269 Criminal Procedure Code, does not violate equal protection,<sup>25</sup> because the notification is in respect of 'classes of offences'; but revocation of the privilege in respect of named individuals alleged to have committed specified offences, does.<sup>1</sup>

2. It is competent for the Legislature to empower the Government to declare an area as a 'dangerously disturbed area' on account of an emergency like a communal riot, and then to provide that certain specified offences, which are triable under the warrant procedure under the Cr. P.C., shall be tried in that area according to the summons procedure.<sup>2</sup>

3. In view of the fact that conditions of tenants vary from locality to locality, the mere fact that a tenancy legislation is extended to only a portion of the territory of a State does not make the law void for contravention of Art. 14.<sup>3</sup>

4. The fact that different State laws prescribe different machinery, procedure or penalty for the same or similar object, e.g., recovery of land revenue, cannot be challenged as discriminatory, for the differentiation is based on the difference in local needs and in the situation of the people of different States.<sup>4</sup>

20. *Kedar Nath v. State of W. B.*, (1952-54) 2 C.C. 100 : (1953) S.C.R. 30.

21. *State of Rajasthan v. Manohar*, (1954) S.C.R. 996 : (1952-4) 2 C.C. 133.

22. *Mula v. Shivubha*, A. 1956 Sau. 29 (30).

23. *Joshi v. State of M. B.*, (1955) S.C.R. 1215.

24. *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254.

25. *Dal Chand v. State*, A. 1953 All. 123; *Radhanath v. State*, A. 1953 Cal. 602; *Amarsingh v. State*, A. 1956 M.B. 107 (110).

1. *Dhirendra v. Legal Remembrancer*, A. 1954 S.C. 424.

2. *Gopichand v. Delhi Administration*, A. 1959 S.C. 611 (614).

3. *Srikrishnan v. State of Rajasthan*, (1955) 2 S.C.R. 531 (536).

4. *Purshottam v. Desai*, (1955) 2 S.C.R. 887 (902) : A. 1956 S.C. 20.

Even a Union law<sup>5</sup> is not liable to be challenged as discriminatory, which provides that the amount due from a defaulting assessee may be recovered "as if it were an arrear of land revenue", if it adopts an existing machinery in the States for enforcing a similar law, though the result of such adoption is that the sanction for violation of the same Union law differs in nature and extent in different States.<sup>6</sup>

5. The Government of Orissa intended to nationalise the road transport services in the State and contemplated the formation of State-controlled joint-stock companies under Orissa Act XXXVI of 1947. But before such a company could be formed, the feudatory States in Orissa merged in the State and the State Government took over the transport services and vehicles owned by those feudatory States. By reason of the acquisition of these vehicles, the State Government came to be in a position to run State-owned vehicles under Orissa Act, 1949, in those areas which had been included in the State by merger. There was thus a difference in the incidents of nationalisation as between two areas of the same State owing to the application of two different laws. *Held*, there was no discrimination since the differentiation was due to the availability of transport vehicles in the two areas. Government was the best judge of the circumstances which obtained within a particular locality which necessitated the application of this Act or the other. "What was essential was that, as between the owners of stage carriage services *operating on a particular route or in a particular area*, no discrimination should be made and all should be treated alike. If each one of such owners had the same Act applied to them they could not be heard to complain about any discrimination. They formed a separate group or class by themselves to be treated in a particular manner having regard to the exigencies of the situation. . . . Such zonal or territorial or geographical division, therefore, would not be violative of the equal protection of laws."<sup>7</sup>

6. A concession given by a State law to the residents of the State, in the matter of education has a reasonable relation to the object of the legislation, *viz.*, promotion of education within the borders of the State which provides the funds for the educational system.<sup>8</sup>

This does not mean, however, that even where a territorial division is selected by the Legislature for the purpose of effecting discrimination against a particular race or class of people residing in that disfavoured area, it would still be upheld as a reasonable classification.<sup>9</sup>

(b) The classification may be according to difference in time.<sup>9</sup>

#### *Illustrations.*

##### *Pending proceedings.*

(i) A taxing law imposing a new rate may provide that assessee in pending proceedings should be assessed at rates prevailing when the proceedings commenced or the liability accrued. Such classification on the basis of time is reasonable.<sup>6</sup>

It is a matter of exclusively for the Legislature to decide from what date a law should be given operation and the law cannot be challenged as discriminatory in not affecting prior transactions.<sup>10</sup>

(ii) Similarly, in enacting a procedural law, it is competent for the Court to treat pending proceedings as a class by themselves, having

5. In this case, the Court upheld s. 46 (2) of the Income-Tax Act.

6. *Ramchandra v. State of Orissa*, (1956) S.C.R. 28.

7. *Joshi v. State of M. B.* (1955) 1 S.C.R. 1215 (1228).

8. *Purshottam v. Desai*, (1955) 2 S.C.R. 887 (901) : A. 1956 S.C. 20.

9. *Ramfilal v. I. T. Officer*, (1951) S.C.R. 127 : A. 1951 S.C. 97.

10. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.



regard to the exigencies of the situation which such pendency itself calls for. If there is no further discrimination *inter se* as between persons affected by such pending proceedings, there is no violation of Art. 14.<sup>11</sup>

If, however, the Legislature discriminates between pending proceedings by selecting an arbitrary date while giving retrospective effect to a legislation, the discriminating provision would offend Art. 14.<sup>12</sup> Similarly, in extinguishing or modifying the rights of a natural class of persons, the Legislature cannot select an arbitrary date having no rational connection with the necessity for such extinction or modification, so as to split the class into two, having different rights and liabilities without any reasonable ground for such differentiation.<sup>13</sup>

(c) The classification may be based on the difference in the nature of the persons, trade, calling or occupation, which is sought to be regulated by the legislation.

### Illustrations.

#### (A) Persons.

1. A law of prohibition may differentiate between civil and military personnel or between citizens of India and foreigners who have no intention of permanently residing in India.<sup>14</sup>

2. The classification of unions as "representative" and "qualified" according to the percentage of their membership and giving a "representative union" having a prescribed higher percentage of membership the right to represent the interests of the entire body of workers in the industry concerned, is a reasonable classification and involves no discrimination.<sup>15</sup>

3. The classification of dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens, for the purpose of legislation with a view to exterminate them, is a reasonable classification and such legislation cannot be challenged as offending against Art. 14 on the ground that the procedure prescribed thereby is different from that provided by the ordinary law of criminal procedure.<sup>16</sup>

4. S. 197 of the Cr. P. C. which requires sanction of the Government to prosecute public servants for acts done or purporting to be done in the discharge of his official duties is not discriminatory because it is based on a rational classification, viz., that public servants have to be protected from harassment in the discharge of his official duties while ordinary citizens not so engaged do not require this safeguard.<sup>17</sup>

5. Similarly, the validity of s. 354, I. P. C. has been upheld on the ground that women require special protection against violation of modesty.<sup>18</sup> Similar reasoning has been advanced to sustain the validity of s. 488, Cr. P. C.<sup>19</sup>

6. In view of the differences between the Hindus and the Jains in matters of faith and religious practices, there is no contravention of Art. 14 if the Legislature provides for the constitution of Boards for

11. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188 (1197) : A. 1953 S.C. 394.

12. *Balabhai v. Bepuji*, (1958) 60 Bom. L.R. 18 (23).

13. *State of Punjab v. Kehar Singh*, A. 1959 Punj. 8 (F.B.).

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682 : (1950-51) C.C. 308.

15. *Kulkarni v. State of Bombay*, (1952-54) C.C. 176.

16. *Gurbachan v. State of Bombay*, (1952-54) 2 C.C. 178 (180).

17. *Matafog v. Bharti*, A. 1956 S.C. 44 : (1955) 2 S.C.R. 925.

18. *Girdhar v. State*, A. 1953 M.B. 147.

19. *Thamsi v. Koonil*, A. 1952 Mad. 529.

the superintendence of Hindu and Jain religious endowments differently.<sup>20</sup>

(E) *Trade, calling etc.*

(i) Special public interest in an industry, e.g., that it is engaged in the production of a commodity vitally essential to the community, may justify its special regulation.<sup>21</sup>

(ii) Since 'hedging' in cotton trading requires experience and stability, there is no violation of Art. 14 if Government treats the older Cotton Associations differently from the newer ones, as regards permission to enter into such transactions.<sup>22</sup>

(d) The special treatment or classification may be based on the degree of public injury or harm<sup>23</sup> or of the urgency of the remedy or regulation. Thus,—

(i) The Legislature may regulate *only* the aggravated forms of a mischief;<sup>24</sup> or confine its restrictions only to particular areas "where the needs are deemed to be clearest".<sup>25</sup> Thus, introducing compulsory education, the provision for earmarking certain areas as 'compulsion areas' is not discriminatory even though such classification may affect certain educational institutions in such compulsion areas without affecting similar institutions in the other areas.<sup>26</sup>

(ii) The Legislature is similarly competent to reform *gradually*, i.e., applying the legislation, in the first instance, to some of the institutions or objects or particular areas only, according to the exigencies of the situation.<sup>27</sup>

(iii) A legislation cannot be said to be discriminatory merely because it cannot provide for the acquisition of all the estates in the State at one and the same time, owing to administrative and financial difficulties.<sup>28</sup>

(e) The nature and object of the legislation itself may offer a reasonable basis of classification.

### Illustrations.

#### *Ban on cattle slaughter.*

In a legislation imposing a ban on the slaughter of animals for the preservation and improvement of livestock, it is legitimate to classify animals into different categories according to their usefulness to society from different standpoints, e.g., usefulness for agriculture, yielding milk and the like.<sup>29</sup> Thus, the Legislature may legitimately ban the slaughter of cows without prohibiting the slaughter of goats and sheep.<sup>30</sup> The butchers who slaughter the animals belonging to these different categories may also be classified on the same basis.<sup>31</sup>

20. *Moti Das v. Sahi*, A. 1959 S.C. 942 (946).

21. *Chitrangit Lai v. Union of India*, (1950-51) C.C. 10 : (1950) S.C.R. 860.

22. *M.B. Cotton Association v. Union of India*, (1952-54) 2 C.C. 232 : A. 1954 S.C. 634.

23. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538 : (1959) S.C.R. 279.

24. *Sakhwant v. State of Orissa*, (1955) 1 S.C.R. 1004.

25. Reference on the Kerala Education Bill, A. 1958 S.C. 956.

1. *Biswambhar v. State of Orissa*, (1954) S.C.R. 842.

2. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (366).

3. *Hanif Quareshi v. State of Bihar*, (1958) S.C.A. 783 (800) : A. 1958 S.C. 731.



*Criminal proceedings.*

(i) Ss. 207A<sup>4</sup> and 251A<sup>5</sup> of the Criminal Procedure Code are based on a reasonable classification inasmuch as they make a distinction between proceedings instituted on police report and those instituted otherwise; the object of the amendment being to secure a speedy disposal of cases, the differentialia adopted for classification is intelligible and relevant to that object, whether or not there has been a previous investigation by a responsible public servant whose duty it is to detect crime.

(ii) Though the mere object of securing a *speedier trial* may not be a reasonable basis for providing a discriminatory procedure for certain offences,<sup>6</sup> it would be a valid basis for classification if the need for a speedier trial has a reasonable relation to the object sought to be achieved by the legislation,<sup>7-9</sup> e.g., taking prompt action against bribery and corruption<sup>10</sup> which had become rampant at a particular point of time. The provisions in ss. 262-4, 269 (4) of the Criminal Procedure Code have been justified on the same ground.<sup>9</sup>

(iii) The object of the Sea Customs Act being the prevention of smuggling, s. 178A of the Act, which throws the burden upon the person from whose custody certain valuable articles are recovered in the reasonable belief that they are smuggled goods, to prove that they are *not* smuggled goods, is not discriminatory on the ground that it lays down an onerous rule of evidence contrary to that under the ordinary law.<sup>11</sup>

(iv) The very nature of a new offence of a serious nature, not to be found in the existing law of crimes, may require trial under a different or special procedure. There would be no violation of equal protection because anybody who committed such offence would be tried under the special procedure.<sup>11</sup>

*Control of rent.*

In a Rent Control Act, it would be reasonable to exempt buildings belonging to Government<sup>12</sup> or a local authority<sup>13</sup> who are not likely to be actuated by any profit-making motive.

*Foreign exchange, earning of.*

In a programme for the promotion of earning foreign exchange, it is competent to the Government to select sugar produced by a particular process only. It is for the Government to select those commodities which have a demand abroad and are, accordingly, capable of earning foreign exchange.<sup>14</sup>

4. *Hannumantha v. State of A. P.*, A. 1957 S.C. 927.

5. *Veeraraghavulu v. State*, A. 1958 A.P. 301.

6. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (314, 328).

7. *Kedar Nath v. State of W. B.*, (1954) S.C.R. 30 : (1952-54) 2 C.C. 100 (103-5) : A. 1953 S.C. 404.

8. *Asgarali v. State of Bombay*, A. 1957 S.C. 503 : (1957) S.C.R. 678.

9. *Govinda Reddy, in re*, A. 1958 Mys. 150; *Bindeswari v. Birju*, A. 1959 Pat. 36.

10. *Babulal v. Collector of Customs*, A. 1957 S.C. 877 : (1957) S.C.R. 1110.

11. *Rehman Shagoo v. State of J. & K.*, A. 1960 S.C. 1 (4).

12. *Baburao v. Bombay Housing Board*, (1954) S.C.R. 572 : (1952-4) 2 C.C. 126.

13. *Venkatadri v. Tenali Municipality*, A. 1956 Andhra 61.

14. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124.

*Foreigners.*

In a law providing for the expulsion and detention of foreigners, reasons of State may make it desirable to classify foreigners into different groups.<sup>15</sup>

On the other hand—

1. The right to have legal disputes adjudicated and legal rights enforced by a court of law is a right which belongs to every individual under the general law. The Legislature cannot deny this right to particular individuals unless there is a reasonable basis for such differentiation. The mere continuance of the dispute for a long period is not a reasonable basis for such differentiation.<sup>16, 17</sup>

2. Legislation directed against a particular named person or corporation is obviously discriminatory and could not be constitutionally justified even if such legislation resulted in some benefit to the public.<sup>17</sup>

3. A law which authorises the Executive to select cases for special treatment<sup>18, 19</sup> or to grant exemption from the operation of law,<sup>20</sup> without providing any guide or standard for such differentiation, is, on the face of it discriminatory.

*Land Reform.*

With a view to effecting a consolidation of holdings, the U. P. Consolidation of Holdings Act, 1954, empowered the State Government to declare that the Government had decided to make a scheme of consolidation for a specified area and then to prepare and revise the revenue records of that area for this purpose, under a procedure which was shorter than the ordinary procedure for the preparation of revenue records, (e.g., by reducing the number of appeals), which would have been applicable if the area had not been declared to be an area for the application of Act. *Held*, the object of the legislation, namely, consolidation, was a boon to the tenure-holders and if it was to be put through, there must be a more expeditious procedure than under the ordinary l.w. Hence, the classification had a rational relation to the object of the legislation.<sup>21</sup>

*Regulation of trade.*

The Coir Industry Act, 1953 was enacted for taking under control of the Union the coir industry. R. 18 of the Rules framed under the Act a person could be registered as an exporter of coir products only if he had during the period of three years preceding the commencement of the Rules exported the prescribed minimum quantity of coir products.

It was urged that the Rule was discriminatory against the small traders without any reasonable basis for the classification. Rejecting this contention, the Supreme Court *held* that the Act was passed in order to put a stop to the malpractices in and loss of reputation of the export trade in coir owing to the fact that exporters often accepted orders beyond their capacity, leading to the non-fulfilment of such

15. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1295).

16. *Ameeroonissa v. Mahboob*, (1952-54) C.C. 117 : (1953) S.C.R. 404 : A1953 S.C. 91.

17. *Ram Prasad v. State of Bihar*, (1952-54) C.C. 122 : (1953) S.C.R. 1129 : A. 1953 S.C. 215.

18. *State of W. Bengal v. Anwar Ali*, (1952) S.C.R. 234 : (1952-4) 2 C.C. 50 (56) : A. 1952 S.C. 75.

19. *Bidi Supply Co. v. Union of India*, A. 1956 S.C. 479.

20. *Chaudhury v. State of Bihar*, A. 1957 Pat. 40 (43).

21. *Attar Singh v. State of U. P.*, A. 1959 S.C. 564 (567).



contracts or the supply of inferior commodities. By prescribing a quantitative minimum standard, and at the same time providing for the exemption of co-operative societies, the Rule aimed at putting the trade on a firmer basis. The differentia adopted by the Rule had thus a rational relation to the object sought to be achieved by the Act.<sup>22</sup>

### How the classification may be made by the Legislature.

It is not necessary that the classification, in order to be valid, must be fully carried out by the statute itself. The Legislature may make a valid classification in any of the following ways :

(a) The statute itself may indicate the persons or things to whom its provisions are intended to apply.<sup>23</sup>

(b) Instead of making the classification itself, the statute may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or the administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature (see *post*).

(c) The Legislature may itself select certain objects to which the law should, in the first instance apply, and then empower the Executive to add other *like* objects according to the exigencies calling for application of the law.<sup>24</sup>

### Equal Protection and Taxation.

The foregoing principles apply to laws of taxation as well, so that such law will not be unconstitutional if there is a reasonable basis for the classification made by it. Thus,

(i) In a law imposing a sales tax,—

(a) The State may not consider it administratively worth while to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worth while to impose the tax.<sup>25</sup>

(b) If a particular commodity has peculiar features in a State (*e.g.* the business of untanned hides and skins), the Legislature may impose the tax on the *purchasers* of that commodity, while in the case of sales of all other commodities, the tax is levied upon the *sellers*.<sup>1</sup>

(ii) In a law of taxation of income, it is competent for the Legislature to graduate the rate of tax according to the ability to pay.<sup>2</sup>

### Equal protection may be denied by procedural laws as well.

1. The guarantee of equal protection applies against substantive as well as procedural laws.<sup>3-5</sup> From the standpoint of the latter, it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence,

22. *Sivarajan v. Union of India*, A. 1959 S.C. 556.

23. *Ramakrishna v. Tendolkar*, A. 1958 S.C. 538 (548).

24. Cf. *Edwards Mills v. State of Ajmer* (1955) 1 S.C.R. 735; (1952-4) 2 C.C. 626 (629).

25. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1096).

1. *Syed Mohamed v. State of Madras*, A. 1953 Mad. 105 (113) affirmed by *Syed Mohamed v. State of Andhra*, (1954) S.C.R. 1117; A. 1954 S.C. 314.

2. *Sukhlal v. Jain*, (1957) 62 C.W.N. 309 (314).

3. *Lachmandas v. State of Bombay*, (1952) S.C.R. 710 (726).

without discrimination. Of course, if the differences are of a *minor* or *unsubstantial* character, which have not prejudiced the interests of the person or persons affected, there would not be a denial of equal protection.<sup>4</sup>

2. In order to find out whether there has been a substantial departure from the normal procedure, the test to be applied is not the degree of inequality, but the *reality* of it. Thus, there is a substantial difference in the procedural right of the accused to equality of treatment where the impugned Act deprives the accused, *inter alia*, of—(a) the safeguards of committal procedure, (b) the trial with the help of jury or assessors, (c) the right to *de novo* trial in case of transfer, (d) the right to redress in higher Courts,—which are offered to other accused of the same class, under the general law of criminal procedure.<sup>4</sup>

3. But a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification having regard to the objective which the legislation has in view and the policy underlying it. Thus, in a law which provides for the exterritorial of undesirable persons who are likely to jeopardize the peace of the locality, it is not an unreasonable discrimination to provide that the suspected persons shall have no right to cross-examine the witnesses who depose against him, for the very object of the legislation which is an extraordinary one would be defeated if such a right were given to the suspected person.<sup>5</sup>

4. If persons who are similarly situated in relation to the object of the impugned legislation can be made subject to a procedure which is substantially different from the ordinary procedure at the option of the Executive, the law which authorises the special procedure must be held to be discriminatory.<sup>6, 7, 8</sup>

#### Provision for Special Court or tribunal, how far offends against Art. 14.

This topic has been dealt with by the Supreme Court in a number of cases, and the position resulting therefrom may now be stated as follows:

1. A law which authorises the trial of any cases by Special Courts or by a procedure which differs substantially from the ordinary procedure to the prejudice of the accused,<sup>9</sup> offends against Art. 14.<sup>10, 11</sup>

(a) Such legislation is discriminatory if it leaves it to the uncontrolled discretion<sup>10, 12</sup> of the Executive to select particular cases under the discriminatory procedure, but not so, if the Legislature itself lays down the policy and the standards according to which the selection is to be made by the administrative authority.<sup>13</sup>

4. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 : A. 1952 S.C. 75

5. *Meenakshi Mills v. Visvanatha*, A. 1955 S.C. 13 : (1955) 1 S.C.R. 787.

6. *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 (744).

7. *Nuthiah v. Commr. of I. T.*, (1955) 2 S.C.R. 1247 (1263) : A. 1950 S.C. 269.

8. *Suraj Mall v. Visvanatha*, (1955) 1 S.C.R. 448 : A. 1954 S.C. 545.

9. *Qasim Razvi v. State of Hyderabad*, (1953) S.C.R. 589 : A. 1953 S.C. 156.

10. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 : A. 1952 S.C. 75.

11. *Lachmandas v. State of Bombay*, A. 1952 S.C. 235 : (1952) S.C.R. 710.

12. *Dhirendra v. Legal Remembrancer*, (1952-54) 2 C.C. 111 (116) : (1955) 1 S.C.R. 224 : A. 1954 S.C. 424.



## Illustrations.

(i) The West Bengal Special Courts Act (X of 1950) had for its object, as declared in the Preamble, "to provide for the speedier trial of certain offences", and laid down a procedure for trial before Special Courts which was different in several respects from the ordinary procedure for the trial of offences under the Criminal Procedure Code. S. 3 empowered the State Government to constitute Special Courts and s. 5 (1) provided that "a Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct."

*Held* (Fazl Ali, Mahajan, Mukherjea, Ayar & Bose JJ.), that the procedure laid down by the Act for the trial before Special Courts varied substantially from that laid down for the trial of offences, generally, by the Code of Criminal Procedure, and that since the Act did not classify or lay down any basis for the classification of the cases which may be directed to be tried by the Special Court, but left it to the uncontrolled discretion of the State Government to direct any case which it liked to be tried by the Special Court under the special procedure, s. 5 (1), of the Act contravened Art. 14 of the Constitution and was, accordingly, void.<sup>13</sup>

(ii) The West Bengal Criminal Law Amendment (Special Courts) Act, 1949, set up a Special Court "for the more speedy trial and more effective punishment of certain offences" and empowered the Provincial Government to 'allot cases for trial' to the special Judge. Though the Preamble of this Act was similar to that of the West Bengal Special Courts Act, 1950 (which was the subject-matter in the case of *State of W. B. v. Anwar Ali*;<sup>14</sup> see above), there was a distinguishing feature in the W. B. Criminal Law Amendment Act, 1949, viz., that the offences for the speedier trial of which the Act provided for a special procedure, were specified in the Schedule to the Act of 1949, and the policy of the Act as to why a speedier trial and special procedure was required for the trial of such offences was also clear from the Act and the circumstances prevailing at the time of its enactment.<sup>15</sup>

(iii) R. 4 (1) (a)-(b) of the Orissa Disciplinary Proceeding (Administrative Tribunal) which empowers the Government, at its unfettered discretion, to proceed against a non-Gazetted servant, for the same kind of misconduct either under the Classification Rules or under the Tribunal Rules, is discriminatory and void.<sup>16</sup>

(b) The policy may be gathered from the Preamble<sup>17, 18</sup> or even from the general tenor of the enactment.

2. But there is no infringement of the Article if certain offences<sup>19</sup> or classes of offences<sup>20</sup> are prescribed by the Legislature to be triable by a Special Court or under such special procedure, according to a reasonable basis of classification.

3. There is no discrimination, unless the procedure prescribed by the impugned legislation is substantially different from the normal procedure.<sup>21, 22</sup> Minor deviations from the general standard would not constitute discrimination.<sup>23, 24</sup>

13. *Kedarnath v. State of W. B.*, (1954) S.C.R. 30 : A. 1953 S.C. 404.

14. *Direndranath v. State of Orissa*, A. 1958 Orissa 96 (100).

15. *Kaithi Ranning v. State of Saurashtra*, (1952) S.C.R. 435 : A. 1952 S.C. 123.

16. *Pannalal v. Union of India*, A. 1957 S.C. 397 (407).

17. *Habeeb v. State of Hyderabad*, (1953) S.C.R. 661 : A. 1953 S.C. 287.

18. *M. K. Gopalan v. State of M. P.*, (1952-54) 2 C.C. 109.

19. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (325) : A. 1952 S.C. 75.

*Illustration.*

S. 2 (b) of the West Bengal Tribunals of Criminal Jurisdiction Act, 1952, which was enacted "for the speedy trial of the offences specified in the Schedule", defines a disturbed area, which in the opinion of the State Government (i) there was, or (ii) there is, any extensive disturbance of the public peace and which has been declared to be a disturbed area. In respect of the first category of disturbed areas the notification has to specify the period covered by the previous disturbances, and it is the specified offences which had taken place during the said period that fall within the mischief of the Act. In the second case the notification takes effect from such date as it may specify and will continue to be in operation till it is revoked.

Proviso to Section 4 (1) enables the Tribunal, when it is trying any case, to try in its discretion any offence other than a scheduled offence with which the accused may be charged at the same trial.

The Petitioners were tried under the Act for certain offences specified in the Schedule of the Act alleged to have been committed between January, 1948 and March, 1950, in an area declared to be a 'disturbed area' under the Act. There was no doubt that the procedure is prescribed by the Act was disadvantageous to the accused and that there was a discrimination against them as compared with other people who might have committed offences of the same kind in the same area who might have been tried under the ordinary procedure before the Act came into force. Nevertheless, the majority of the Supreme Court held that there was a rational nexus between the object of the Act and the classification made.<sup>20</sup>

4. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 of the Constitution must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. Merely because the Government is not compellable to allot all cases of offences set out in the Schedule to the Act to Special Judges but is vested with a discretion in the matter, it cannot be said that the provision offends against Article 14 of the Constitution.<sup>21</sup> If the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority in accordance with the standard indicated or the underlying policy and object disclosed, is not a sufficient ground for condemning it as arbitrary and therefore obnoxious to Art. 14.<sup>22</sup>

### **Ad hoc legislation against individuals.**

1. Even though it is permissible for the Legislature to classify a single individual where he possesses real and substantial features different from other individuals in relation to the object of the legislation in question<sup>23</sup> (p. 33, *ante*), Art. 14 would not tolerate any discriminatory legislation against a single named individual or individuals which simulates a Bill of Attainder,<sup>24</sup> and no reasonable basis for the classification appears on the face of the legislation nor is

20. *Kansari Haldar v. State of W.B.*, (1960) 1 M.L.J. (S.C.) 411.

21. *Kedarnath v. State of W. B.*, (1953) S.C.R. 30 : (1952-54) 2 C.C. 100 (104-5) : A. 1953 S.C. 404.

22. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (548) : (1959) S.C.R. 279.

23-4. *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.



deducible from the surrounding circumstances or matters of common knowledge.<sup>5</sup>

2. In the name of classifying individuals on the ground of special features, the Legislature cannot assume the jurisdiction to *adjudicate* disputes regarding private rights and thus deprive named individuals of their right to go to the duly constituted courts a right of access to which for the determination of private legal rights belongs to every person.<sup>6,7</sup>

### Who can complain of the violation of equal protection.

Only a person who has been aggrieved by the discrimination alleged, can challenge the validity of a law on the ground of violation of Art. 14. Thus, where the contention was that s. 3 (2) (c) of the Foreigners Act, 1946 read with s. 2 (a), discriminated between different classes of British subjects *inter se*, it was held that a foreigner who was not a British subject was not entitled to challenge the validity of the Act on this ground.<sup>8</sup> In other words, the Petitioner cannot complain unless he belongs to the class of persons who are alleged to have been discriminated against.<sup>9</sup>

### Presumption that the classification is reasonable.

(i) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.<sup>10</sup>

(ii) A legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it.<sup>11</sup> In order to sustain the presumption of constitutionality, therefore, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.<sup>12,13</sup>

### Burden of Proof.

1. The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the law as a violation of the guarantee of equal protection.<sup>14</sup> Further, if any state of facts can be reasonably conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.<sup>15</sup> Throwing out of vague hints that there may be other instances of like nature which the impugned legis-

5. *Ramkrishna v. Tendolkar*, (1950) S.C.R. 279.

6. *Ram Prasad v. State of Bihar*, A. 1953 S.C. 215 : (1953) S.C.R. 1129.

7. *Ameeroonissa v. Mahboob*, (1953) S.C.R. 404 (416) : A. 1953 S.C. 91.

8. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1295).

9. *Kamakhyia v. State of Bihar*, A. 1957 Pat. 30.

10. *State of Bombay v. Balsara*, (1950-51) C.C. 308 (316) : A. 1951 S.C. 318.

11. *Harnam Singh v. R. T. A.* (1952-54) 2 C.C. 129 (131).

12. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538 : (1959) S.C.R. 279.

13. *Hanif Quareshi v. State of Bihar*, (1958) S.C.A. 783 (800) : A. 1958 S.C. 731.

lation has left out, is not enough; it must be proved that the selection by the Legislature has been arbitrary.<sup>14,15</sup>

2. It is for the Petitioner to show that the persons or objects as between whom the Legislature is alleged to have discriminated, are similarly situated.<sup>17,18</sup>

3. But where the statute shows on the face of it that the Legislature made no attempt at all to make a classification but singled out a particular individual or class without having any difference peculiar to that individual or class, the presumption of reasonableness in favour of the Legislature is instantly rebutted and the person challenging the statute cannot be called upon to adduce further or external evidence to discharge his onus.<sup>19</sup> In such a case, the Court is bound to invalidate the statute as violating the guarantee of equal protection,<sup>20</sup> unless the State is able to establish a reasonable basis of classification by extraneous evidence or by facts of which the Court may take judicial notice.<sup>21</sup>

### How the presumption may be rebutted.

The presumption that the classification made by a law is reasonable may be rebutted not only by (a) referring to the contents of the law itself but also by (b) extraneous evidence.

#### 1. Intrinsic evidence.

1. The presumption may be rebutted by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class, and yet the law hits only a particular individual or class.<sup>21</sup> The presumption is of no avail when a law is discriminatory on the face of it and it is patent that the Legislature made no attempt to make a classification at all.<sup>21,22</sup>

2. It is true that the presumption should always be that the Legislature understands and correctly appreciates the needs of its own people and that its discriminations are based on adequate grounds, but to carry the presumption to the extent of holding that there must be some *undisclosed and unknown* reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clause a mere 'rope of sand', in no manner restraining State action.<sup>20, 23</sup>

While good faith and knowledge of existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the Court cannot go to the extent of holding that there must be some undisclosed reasons for the discrimination.<sup>22</sup>

3. Where the discrimination is apparent on the face of the statute, the onus of showing this just relation and basis of discrimination is upon the party who supports the alleged discrimination. The grounds

14. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (33) : (1950) S.C.R. 869 : A. 1951 S.C. 41.

15. *Ameerunnissa v. Mahboob*, (1953) S.C.R. 404 (417).

16. *Harnam Singh v. R. T. A.*, (1952-54) 2 C.C. 129 (131).

17. *Srikishan v. State of Rajasthan*, (1956) S.C.A. 403 (406).

18. *Syed Mohammad v. State of Andhra*, (1954) S.C.R. 1117 : (1952-54) 2 C.C. 132 : A. 1954 S.C. 314.

19. *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.

20. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (552) : (1959) S.C.R. 279.

21. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

22. *State of West Bengal v. Anwar Ali*, (1952) S.C.R. 284 (335).

23. *State of Rajasthan v. Manohar*, (1952-54) 2 C.C. 133 (135).



for differentiation must be pleaded and supported by evidence,<sup>22</sup> or affidavit.<sup>23</sup>

## II. *Extraneous evidence.*

1. The petitioner may also prove by adducing evidence<sup>24</sup> that the classification made by the law was without any reasonable basis and that the subject selected by the law had no features to distinguish it from other subjects similarly situated so as to justify a special treatment.<sup>24, 25</sup>

2. On the other hand, where the basis of classification is not apparent on the face of the law, it may be established by the State not only by material evidence<sup>26</sup> or by bringing to the notice of the Court facts of which the Court can take judicial notice<sup>1</sup> but also by making an affidavit,<sup>24</sup> stating the circumstances which led to the making of a statutory instrument, e.g., a notification.<sup>24</sup> Similarly, parliamentary proceedings may be referred to for showing the background in which an enactment was made.<sup>2</sup>

## Law conferring discretionary power upon the Executive.

1. A legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection if it confers upon the executive or administrative authority an *unguided* or uncontrolled discretionary power in the matter of application of the law.<sup>2, 4</sup> For, where the selection is left to the absolute and unfettered discretion of the administrative authority, with nothing to guide or control its action, the difference in treatment rests solely on arbitrary selection by that authority.<sup>3</sup>

Thus,—

(a) A law which authorises the Executive to select<sup>2, 4</sup> cases for special treatment or to grant exemption from its operation without providing any guide or standard for such differentiation is, on the face of it, discriminatory.

(b) If the Legislature, while enacting a special law for dealing with a special problem, authorises the Executive at its option, to proceed against a person either under the special law or under the general law which would otherwise have been applicable the conferment of arbitrary power upon the Executive to apply the more stringent provisions of the special law against any person at its pleasure, must be held to offend against equal protection.<sup>4, 5</sup>

## Illustration.

S. 5 of the Taxation on Income (Investigation Commission) Act, 1947, authorised the Central Government to refer to the Investigation Commission, for dealing under that Act the case of any person whom the Central Government or the Commission had reason to believe to have "to a substantial extent evaded payment of taxation on income". Such persons could otherwise be dealt with under s. 34 of the Income

24. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538 (552).

25. *Syed Mohammad v. State of Andhra*, (1954) S.C.R. 1117 : (1952-54) 2 C.C. 132 : A. 1954 S.C. 314.

1. *Kedarnath v. State of W. B.*, (1954) S.C.R. 30.

2. *Cf. Chitrang Lal v. Union of India*, (1950) S.C.R. 869.

3. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284 (310; 315-6; 329; 355) : A. 1952 S.C. 75.

4. *Suraj Mall v. I. T. I. Comm.*, A. 1954 S.C. 545.

5. *Saghir Ahmad v. State of U. P.*, (1952-54) 2 C.C. 248 (260) : (1955) 1 S.C.R. 707 : A. 1954 S.C. 728.

Tax Act, 1922, and the provisions of the special Act of 1947 were substantially more stringent than those of the Income Tax Act. *Held*, the standard of 'substantial extent' was indefinite and offered no guide to the Executive in the matter of selection. The provision in s. 5 was accordingly, unconstitutional.\*

II. 1. If, however, a law indicates the policy which inspired it, the mere fact that it does not itself make a complete and precise classification of the subject-matter, but leaves the selective application of the law to be made by the executive authority in accordance with the policy indicated, there is no contravention of Art. 14 by the law itself.<sup>7</sup>

Thus,

(a) The validity of a law which provided that—

"A Special Judge shall try such offences or classes of offences or such cases or classes of cases as the Government... may, by general or special order in writing direct" was upheld on the ground that the law had laid down a definite legislative policy, viz., "to provide for public safety, maintenance of public order and preservation of peace and tranquillity", and the Executive had to exercise its power in conformity with this legislative policy; if it failed, the act of the Executive would be liable to be challenged, but the Act itself could not be challenged as discriminatory.<sup>8</sup>

(b) Similarly, it has been held that the Industrial Disputes Act cannot be invalidated on the ground of contravention of Art. 14, for having authorised the Government to refer a dispute either to a Board of Conciliation or to a Court of Enquiry or to a Tribunal, at its discretion, inasmuch as the policy of the Act was expressed to be for the purpose of 'investigation and settlement of industrial disputes' and the Government was to decide what step would be conducive to this end, having regard to the exigencies of each particular case.<sup>9</sup>

(c) Nor is a law which confers power on the Government to exempt any person from its operation bad for contravention of Art. 14, if the policy of the Legislature is clear from the statute.<sup>10</sup>

(d) Where the maximum penalty that may be imposed for an offence is laid down by a statute and the authority is vested with a discretion to fix the quantum of the penalty subject to that maximum having regard to the gravity of the offence in relation to the object of the Act, it cannot be said that an unguided discretion has been vested in the authority.<sup>11</sup>

2. Discretionary power is not necessarily discriminatory when the legislative policy<sup>12,13</sup> is clear from the statute, and the discretion is vested in the Government or other high authority as distinguished from a minor official,<sup>14,15</sup> or when the Rules framed under the Act lay down the principles or factors to be taken into consideration in exercising the discretion.<sup>16</sup>

6. *Meenakshi Mills v. Viswanath*, A. 1955 S.C. 13.

7. *Kathi Ranning v. State of Saurashtra*, (1952-54) 2 C.C. 73 : (1952) S.C.R. 435 : A. 1952 S.C. 123.

8. *Niemla Textile Mills v. 2nd Punjab Tribunal*, (1957) S.C.R. 335 : A. 1957 S.C. 329.

9. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.

10. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151 (1158).

11. *Biswambhar v. State of Orissa*, (1954) S.C.R. 842.

12. *Amar Singhji v. State of Rajasthan*, (1955) 2 S.C.R. 303.

13. *Matafog v. Bhari*, A. 1955 S.C. 44 (48) : (1955) 2 S.C.R. 925 (932).

14. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538; Ref. on the Kerala Education Bill, A. 1958 S.C. 956.

15. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (441) : A. 1956 S.C. 676.



9. The bare possibility that the discretionary power may be abused is no ground for invalidating the statute;<sup>15a</sup> but if the administrative authority misuses the power by making an arbitrary selection without regard to the policy laid down by the Legislature, the administrative act will be struck down as discriminatory<sup>15a</sup> (see p. 51, *post*).

#### How the policy behind the statute is to be determined.

It is clear that where the Legislature does not itself make the classification, but leaves it to be made by the administrative authority, it must lay down the policy or the standard according to which the delegate must make the classification.

(a) The policy of a law may be gathered from the Preamble,<sup>15a-16</sup> read in the light of the circumstances in which it was passed.<sup>17-18</sup> Discretionary power has also been held not to be arbitrary where the conditions for its exercise are laid down in the Rules made under the Act.<sup>19</sup>

(b) Where the standard or guide furnished by the statute is *vague* or *uncertain*, it amounts to the absence of any guide at all and the law must be struck down as conferring unguided power upon the Executive to discriminate.<sup>19</sup>

#### Illustrations.

(i) The test of 'speedier trial' was held to be too vague to form the basis of a rational classification where the Government was empowered to direct any offence or case to be tried by a Special Court under a procedure substantially differing from the ordinary law of criminal procedure.<sup>19</sup>

(ii) But the speedier trial of *specified* offences shall be a rational basis for classification if the speedy trial has an intimate rational relation to the object of the legislation, such as 'public safety' or 'maintenance of public order', in a dangerously disturbed area.<sup>20</sup>

(c) But—

(i) Whether the standard offered by the statute is vague or not is to be determined upon an examination of the Act read as a whole.<sup>21</sup>

#### Illustration.

R. 3 of the Railway Services (Safeguarding of National Security) Rules, 1949 says—

"A member of the Railway Service who—... is reasonably suspected to be engaged in *subversive activities*... may be compulsorily retired from service... Provided that a member... shall not be so retired... unless the competent authority is satisfied that *his retention in public service is prejudicial to national security*..."

Held, that the expression 'subversive activities' was not vague or indefinite when considered in the context of 'national security'; no activity could be held by the authority as subversive unless it was

15a. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (551) : (1959) S.C.R. 279.

16. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510 : (1957) S.C.R. 605 (621); Ref. on the Kerala Education Bill, A. 1958 S.C. 956.

17. *Kathi Ranning v. State of Saurashtra*, (1952-4) 2 C.C. 73 (82, 85) : (1952) S.C.R. 435.

18. *Pannalal v. Union of India*, A. 1957 S.C. 397 (410) : (1957) S.C.R. 233.

19. *State of W. B. v. Anwar Ali*, (1952) S.C.R. 234 (238) : A. 1952 S.C. 75.

20. *Gopi Chand v. Delhi Administration*, A. 1959 S.C. 609.

prejudicial to national security. Hence, the Rule was not unconstitutional.<sup>21</sup>

(ii) The standard prescribed by the Act cannot be held to be vague so as to offer no reasonable basis of classification, if its precise import can be gathered from the history of the legislation and the circumstances which prevailed at the time of its enactment, and to ascertain these facts, the Court may take affidavits on behalf of the State.<sup>22-23</sup>

**Denial of equal protection may take place in the administration of law.**

1. Equal protection may be denied not only by legislation but also by the administration of a law. The principles to be applied where an administrative act is challenged should not be confused with those which are to be applied when the law itself under which the administrative act is purported to be done is challenged.

2. When the statute itself is not discriminatory and the charge of violation of equal protection is only against the official who is entrusted with the duty of carrying it into operation,—the charge will fail if the power has been exercised by the officer in good faith within the limitations imposed by the Act and for the achievement of the objects the enactment had in view; if, however, the person who alleges discrimination succeeds in establishing that the step was taken *intentionally* for the purpose of injuring him, or in other words, that it was a *hostile* act directed against him, the executive act complained of must be annulled, even though the statute itself be not discriminatory. In short, if the Act is fair and good, the authority who has to administer it will be generally protected. To this rule, however, there is an exception, which comes into play when there is evidence of *mala fides* in the application of the Act.<sup>24</sup>

(a) In short, when a law is challenged as discriminatory, the relevant consideration is the effect of the law and not the intention of the Legislature. But when a law is itself non-discriminatory but its administration is challenged as discriminatory, the question of intention of the administrative authority becomes material; in such a case, the administrative action cannot be said to have offended Article 14 unless it was '*mala fide*' or actuated by a hostile intention.<sup>25</sup>

(b) Such *mala fide* administration is never presumed, but has to be proved. On the other hand, the presumption is that public officials will discharge their duties honestly and in accordance with the rules of law.<sup>1</sup> This presumption is heightened when the law vests a discretion in high officials or authorities,<sup>2</sup> as distinguished from minor officials, or in the Government itself.<sup>3</sup>

(c) If, however, the Executive exercises its power in disregard of the policy indicated by the Legislature, then the exercise of the power

21. *Balakotiah v. Union of India*, A. 1958 S.C. 232 (237) : (1958) S.C.R. 1052.

22. *Kalhi Ranning v. State of Saurashtra*, (1952) S.C.R. 435 : A. 1952 S.C. 123.

23. *Musalliar v. Potti*, (1955) 2 S.C.R. 1196 (1237).

24. *State of W. B. v. Anwar Ali*, (1952-54) 2 C.C. 49 : A. 1952 S.C. 75 : (1952) S.C.R. 284.

25. *Kedarnath v. State of W. B.*, (1952-54) 2 C.C. 100 (106) : (1954) S.C.R. 30.

1. *Pannalal v. Union of India*, A. 1957 S.C. 397 (408) : (1957) S.C.R. 233.

2. *Malajog v. Bhari*, (1955) 2 S.C.R. 925 : A. 1956 S.C. 44.

3. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (551) : (1959) S.C.R. 279.



by the Executive can be annulled as discriminatory and being in contravention of Art. 14.<sup>3a, 4</sup> The result is the same as if the Executive had inflicted discrimination in the absence of legislative support altogether.<sup>5</sup> In this case, no question of reasonableness of legislative classification arises, and the executive order is directly hit by Art. 14, read with Act. 12.<sup>4</sup>

### A retrospect on classification and judicial review thereof.

A fitting summary of the foregoing principles has been given in the Supreme Court decision in *Ramkrishna v. Tendolkar*<sup>6</sup> thus—

(1) Where the statute itself indicates the persons or things to whom its provisions may apply either on the face of it or to be gathered from the surrounding circumstances known to or brought to the notice of the Court, the Court will examine whether the classification can be deemed to rest upon differentia distinguishing the persons or things grouped from those left out and whether such differentia has a reasonable relation to the object sought to be achieved irrespective of whether the statute is intended to apply to a particular person or thing or to a certain class of persons or things.<sup>4</sup>

(2) Where the statute directs its provisions against an individual person or thing or to several individual persons or things but no reasonable basis of classification appears on the face of it or can be deduced from the surrounding circumstances, the Court will strike down the law as a case of naked discrimination.<sup>4</sup>

(3) Where the statute makes no classification for applying its provisions but leaves it to the discretion of the Government to select and classify, the Court will not strike down the law out of hand but will examine and ascertain if the statute has laid down any principle or policy for guiding the exercise of discretion by Government in the matter of selection and classification, and if no such principle or policy is found, the statute will be struck down as providing for the delegation of arbitrary or uncontrolled power to the Government so as to enable it to discriminate between persons and things similarly situate as well as any executive action taken under such law.<sup>4</sup>

(4) Where the statute has made no classification and leaves to the discretion of the Government to select and classify the persons or things to whom the provisions are to apply but at the same time it lays down a principle or policy for guiding the exercise of the discretion, the Court will uphold the law as constitutional.<sup>4</sup>

(5) Where the statute leaves it to the discretion of the Government to select and classify the persons or things to whom the provisions shall apply and also indicates the principle or policy to guide the exercise of the discretion, but the Government has not followed such principle or policy, the action of the Government will be struck down, but the statute itself will not be condemned as unconstitutional.<sup>4</sup>

### Discrimination by judicial acts.

1. While Art. 14 extends to all State action including even acts of the Judiciary, and would hit arbitrary or wilful discrimination by a Court, the Article does not guarantee uniformity of decisions or of the exercise of judicial discretion. Every judicial decision must of neces-

3a. *Pannalal v. Union of India*, (1957) S.C.R. 233.

4. *Kathi Ranning v. State of Saurashtra*, (1952-54) C.C. 72 (81) : (1952) S.C.R. 435.

5. *Bidi Supply Co. v. Union of India*, (1956) S.C.R. 267 : A. 1956 S.C. 479.

6. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (548-549) : (1959) S.C.R. 279.

sity depend on the facts and circumstances of the particular case before the Court and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial or equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.<sup>7</sup>

2. Though the vesting of unguided discretion in the Executive to direct the trial of particular persons under a special procedure may be discriminatory, it would not be so where the discretion is vested in judicial officers who have to exercise their discretion according to well-settled principles and subject to revision by superior courts.<sup>8</sup>

### **'The State shall not'.**

The word 'State' is to be understood in the sense used in Art. 12. Any State action, executive, legislative or judicial, is void if it contravenes Art. 14.<sup>9</sup>

### **Discrimination in favour of the State itself.**

What is enjoined by Art. 14 is that the State shall not, by its acts, discriminate as between two individuals, who are similarly circumstanced. It has no application to any possible discrimination in favour of the State itself when the State enters into some transaction or business which is open to private individuals.<sup>7</sup> The State does not cease to be a State when it enters into a trade like any other trader.<sup>10</sup>

On the same principle, it has been held that s. 417 (1) of the Cr. P. C., which places the State on a special footing as regards appeals against acquittals, is not invalid on the ground of contravention of Art. 14.<sup>11</sup>

### **Decisions on the validity of some Acts in relation to Art. 14.**

#### **Arms Act, 1878 :**

*Held invalid.*—S. 29.<sup>12</sup>

#### **Assam State Acquisition of Zamindari Act, 1951 :**

*Held valid.*<sup>13</sup>

#### **Bar Councils Act, 1926 :**

*Held valid.*—S. 4 (3).<sup>13a</sup>

#### **Bihar Panchayat Raj Act, 1948 :**

*Held valid.*—Ss. 62,<sup>13b</sup> 68.<sup>13b</sup>

#### **Calcutta Municipal Act, 1951 :**

*Held invalid.*—S. 237.<sup>13c</sup>

7. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707 : A. 1954 S.C. 728.

8. *Budhan v. State of Bihar*, (1952-54) 2 C.C. 157 (160) : A. 1955 S.C. 191.

9. *Sheo Pershad v. State of Punjab*, A. 1957 Punj. 150.

10. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225.

11. *State v. Shanker*, A. 1958 All. 432; *In re Krishnayya*, A. 1957 A.P. 163.

12. *Mehar Chand v. State*, A. 1959 All. 660 (663).

13. *Bhadrabendra v. State of Assam*, A. 1959 S.C. 503 (512).

13a. *Manilal v. Union of India*, A. 1960 Bom. 83.

13b. *Baldeo v. State of Bihar*, A. 1957 S.C. 612.

13c. *Nawab Ariff v. Corp'n. of Calcutta*, (1959) 64 C.W.N. 1.



**Civil Procedure Code :**

*Held valid.*—Ss. 80;<sup>14</sup> 133;<sup>15</sup> O. 21, r. 22.<sup>16</sup>

**Commissions of Inquiry Act, 1952 :**

*Held valid.*—S. 3.<sup>17</sup>

**Companies Act, 1956 :**

*Held valid.*—S. 240 (5).<sup>18</sup>

**Criminal Procedure Code :**

*Held valid.*—Ss. 14 (1);<sup>19</sup> 30;<sup>20</sup> 87B;<sup>21</sup> 156;<sup>22</sup> 176;<sup>23</sup> 193 (2);<sup>24</sup> 198B;<sup>25</sup> 197;<sup>1</sup> 269;<sup>2,3</sup> 207A;<sup>4</sup> 251A;<sup>5</sup> 260;<sup>6</sup> 263;<sup>7</sup> 260-264;<sup>8</sup> 269;<sup>9</sup> 350;<sup>10</sup> 417(1);<sup>11</sup> 488;<sup>12</sup> 417 (1);<sup>13</sup> 421;<sup>14</sup> 497.<sup>15</sup>

**Criminal Law Amendment Act, 1952 :**

*Held valid.*—Act as a whole;<sup>16</sup> s. 6.<sup>17</sup>

**East Punjab Public Safety Act, 1949 :**

*Held valid.*—S. 36.<sup>18</sup>

**Employees Provident Fund Act, 1952 :**

*Held valid.*—S. 5;<sup>19</sup> 16.<sup>20</sup>

14. *State of Madras v. Venkata*, A. 1957 A.P. 675.
15. *Bashist v. Radhika*, A. 1952 Punj. 97.
16. *Pichyaya v. Govt. of Andhra*, A. 1957 A.P. 136.
17. *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538 (550).
18. *Narayanlal v. Maneck*, A. 1959 Bom. 320 (332).
19. *M. K. Gopalan v. State of M. P.*, (1952-54) 2 C.C. 109 : A. 1954 S.C. 362.
20. *Budhan v. State of Bihar*, A. 1955 S.C. 191.
21. *Bhimaji v. Ramrao*, A. 1955 Bom. 195.
22. *Gopal v. State*, A. 1959 Assam 231.
23. *Rajangum v. State of Madras*, A. 1959 Mad. 294(307).
24. *Babu Ram v. State*, A. 1958 All. 838.
25. *Muneshwaranand v. State of U.P.*, A. 1959 All. 21.
1. *Matajog v. Bhari*, (1955) 2 S.C.R. 925 : A1956 S.C. 44.
2. *Dhirendra v. Legal Remembrancer*, (1952-4) 2 C.C. 111 : (1955) 1 S.C.R. 224.
3. *Govinda Reddy, in re*, A. 1958 Mys. 150.
4. *Hanumantha v. State of A. P.*, A. 1957 S.C. 927.
5. *Bindeshwari v. Birju*, A. 1959 Pat. 46(49).
6. *Dalchand v. State*, A. 1953 All. 93; *Prasad v. State*, A. 1953 Cal. 394.
7. *Ghani v. State*, A. 1958 All. 316.
8. *State v. Shankar*,<sup>26</sup> A. 1958 All. 432; *Krishnayya, in re*, A. 1957 A.P. 163.
9. *Thamsi v. Kannu*, A. 1952 Mad. 529.
10. *State v. Shankar*, A. 1958 All. 432.
11. *Madho Singh v. State*, A. 1957 Raj. 204.
12. *Sobhanlal v. Devchand*, A. 1957 Raj. 10.
13. *Asgarali v. State of Bombay*, A. 1957 S.C. 503.
14. *Tajkhan v. State*, A. 1958 Raj. 1.
15. *Gopi Chand v. Delhi Administration*, A. 1959 S.C. 609.
16. *Hindusthan Electric Co. v. Regional P. F. Commr.*, A. 1959 Punj. 27.
17. *M. P. Mineral Industries v. Regional P. F. Commr.*, A. 1959 Bom. 60.

**Employees' State Insurance Act, 1948 :**

*Held valid.*—Ss. 1 (3);<sup>18</sup> 16 (2).<sup>19</sup>

**Essential Commodities Act, 1955 :**

*Held valid.*—S. 3.<sup>20</sup>

**Enemy Agents Ordinance (Jammu & Kashmir), 1949 :**

*Held valid.*—Entire Ordinance.<sup>21</sup>

**Evidence Act :**

*Held valid.*—S. 114.<sup>22</sup>

*Held invalid.*—S. 27, in so far as it discriminates between persons in police custody and persons not in police custody.<sup>23</sup>

**Factories Act, 1948 :**

*Held valid.*—S. 85 (1).<sup>24</sup>

**Forward Contracts Regulation Act, 1952 :**

*Held valid.*—Ss. 1,<sup>25</sup> 15,<sup>26</sup> 17.<sup>27</sup>

**Hindu Marriage Act, 1955 :**

*Held valid.*—S. 11.<sup>1</sup>

**Imports & Exports (Control) Act, 1947 :**

*Held valid.*—S. 3(2).<sup>2</sup>

**Income Tax Act, 1922 :**

I. *Held valid.*—Ss. 4(2);<sup>3</sup> 5(7A);<sup>4</sup> 5(7B);<sup>5</sup> 46(2);<sup>6</sup> 23A;<sup>7</sup> 33B;<sup>8</sup> 34(1A);<sup>9</sup> 33A;<sup>10</sup> 28(4);<sup>11</sup> 42(1);<sup>12</sup> 46(1);<sup>12a</sup> 51;<sup>11</sup> 52.<sup>11</sup>

II. *Held invalid.*—S. 34(3), 2nd Proviso.<sup>12</sup>

18. *Anand v. Employees' S. I. Corpn.*, A. 1957 All. 136.
19. *Bharat Board Mills v. R. P. F. Commr.*, A. 1957 Cal. 702.
20. *Diwan Sugar Mills v. Union of India*, A. 1959 S.C. 626 (633).
21. *Rehman v. State of J. & K.*, A. 1960 S.C. 1.
22. *Glan Chand v. State of J. & K.*, A. 1957 J. & K. 32 (F.B.).
23. *Deoman v. State*, A. 1960 All. 185 (F.B.).
24. *Ram Chandra v. State of Bihar*, A. 1957 Pat. 247.
25. *Raymon & Co. v. Waverley Jute Mills*, A. 1959 Cal. 89.
1. *Lakshmi v. Ramaswami*, (1959) 1 M.L.J. 333.
2. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151 : A. 1957 S.C. 648.
3. *Jamulamma v. I. T. O.*, A. 1956 Mad. 387.
4. *Pannalal v. Union of India*, (1957) S.C.R. 233 : A. 1957 S.C. 397.
5. *Bhagwan v. I. T. O.*, A. 1956 Punj. 148.
6. *Collector of Malabar v. Ebrahim*, (1957) S.C.R. 970 : A. 1957 S.C. 688; *Purshottam v. Desai*, (1955) 2 S.C.R. 887 : A. 1956 S.C. 20.
7. *Spencer v. I. T. O.*, A. 1957 Mad. 133.
8. *Dawjee v. Jain*, A. 1957 Cal. 244.
9. *Jai Kishan v. I.T.O.*, A. 1960 All. 19.
10. *Sitalpore C. C. v. Union of India*, A. 1957 Cal. 319.
11. *Sivagaminatha v. I. T. O.*, A. 1956 Mad. 1; *Appa Rao v. I. T. O.*, A. 1959 A.P. 391.
12. *Abdul v. Commr. of I. T.*, A. 1958 Mad. 1.
- 12a. *Narayanappa v. I. T. O.*, A. 1960 Mys. 40 (43).
13. *Prasar v. Dwarkadas*, A. 1956 Bom. 530; *Nair v. I.T.O.*, A. 1958 Ker. 248.



**Income-tax Investigation Commission Act, 1947 :**

*Held invalid.*—Ss. 5 (4);<sup>14</sup> s. 5 (1) (after amendment of s. 34 of the Income-tax Act in 1954).<sup>15</sup>

*Held valid.*—S. 5(1).<sup>16</sup>

**Indian Penal Code :**

*Held valid.*—Ss. 354;<sup>17</sup> 409, as applied to public servants;<sup>18</sup> 497.<sup>19</sup>

**Industrial Disputes Act, 1947 :**

*Held valid.*—S. 10;<sup>20</sup> 36 (4).<sup>21</sup>

**Jammu & Kashmir Enemy Agents Ordinance :**

*Held valid.*<sup>22</sup>

**Land Acquisition Act, 1894 :**

*Held valid.*—Ss. 6;<sup>23</sup> 17.<sup>23, 24</sup>

**Madras Commercial Crops Market Act, 1933 :**

*Held valid.*—S. 5.<sup>25</sup>

**Madras Prohibition Act, 1937 :**

*Held valid.*—S. 4 (2).<sup>1</sup>

**Madras Sugar Factories Control (Mysore Amendment) Act :**

*Held valid.*—S. 14.<sup>2</sup>

**Motor Vehicles Act, 1939 :**

*Held valid.*—Ss. 44(5);<sup>3</sup> 57A;<sup>4</sup> 53(2);<sup>4</sup> 96.<sup>4</sup>

**Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carriers' Services) Act, 1947 :**

*Held valid.*<sup>1</sup>

14. *Suraj Mall v. Visvanatha*, A. 1954 S.C. 545.

15. *Muthiah v. I. T. Commr.*, A. 1956 S.C. 269.

16. *Musaffar v. Venkatachalam*, A. 1956 S.C. 246 : (1955) 2 S.C.R. 1196.

17. *Girdhar v. State*, 3. 1953 M.B. 147.

18. *Om Prakash v. State of U. P.*, (1957) S.C.R. 423.

19. *Yusuf v. State of Bombay*, (1954) S.C.R. 930.

20. *Niemla Textile Mills v. Punjab Industrial Tribunal*, (1957) S.C.R. 335 : A. 1957 S.C. 329.

21. *Rangaswamy v. Industrial Tribunal*, A. 1953 Mad. 447.

22. *Rehman v. State of Kashmir*, A. 1960 S.C. 1.

23. *Aurora v. State of U. P.*, A. 1958 All. 126.

24. *Arjan v. State of Punjab*, A. 1959 Punj. 538 (543).

25. *Parekh v. S. K. Market Committee*, A. 1959 Mys. 29.

1. *Krishna v. State of Madras*, A. 1957 S.C. 297.

2. *Indian Sugar & Refineries v. State of Mysore*, A. 1958 Mys. 64.

3. *Dhanmull v. R. T. A.*, A. 1957 Mad. 387.

4. *S. N. T. Co. v. S. T. A.*, A. 1957 Cal. 638.

5. *Prakash v. State of U.P.*, A. 1959 All. 373 (376).

6. *Vanguard Ins. Co. v. Sarla*, A. 1959 Punj. 297 (302)

7. *Ram Chandra v. State of Orissa*, A. 1956 S.C. 298.

**Presidency Towns Insolvency Act, 1909 :***Held valid.*—S. 9(e).<sup>8</sup>**Prevention of Corruption Act, 1947 :***Held valid.*—S. 4 (1).<sup>9</sup>**Provincial Insolvency Act, 1920 :***Held valid.*—S. 6 (e).<sup>4</sup>**Preventive Detention Act, 1950 :***Held valid.*—Ss. 3 (1) (b);<sup>10</sup> Act as a whole.<sup>11</sup>**Rajasthan (Protection of Tenants) Ordinance, 1949 :***Held valid.*—S. 7.<sup>12a</sup>**Representation of the People Act, 1951 :***Held valid.*—S. 54 (4);<sup>12</sup> 86.<sup>13</sup>**Sea Customs Act :***Held valid.*—Ss. 167(8),<sup>14</sup> 178A,<sup>15</sup> 183.<sup>16</sup>**Sugar Export Promotion Act, 1958 :***Held valid.*—S. 1.<sup>16</sup>**Suppression of Immoral Traffic in Women and Girls Act, 1956 :***Held invalid.*—S. 20.<sup>17</sup>**Taxation on Income (Investigation Commission) Act, 1947 :***Held invalid.*—S. 5 (4),<sup>18</sup> s. 5 (1),<sup>19</sup> 8A.<sup>20</sup>**U. P. Consolidation of Holdings Act, 1954 :***Held valid.*—Ss. 29B,<sup>21</sup> 49.<sup>21</sup>**U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 :***Held valid.*—S. 15.<sup>22</sup>8. *Zackeria v. Srinivas*, A. 1957 Mad. 403.9. *Emden v. State of U.P.*, (1960) 1 M.L.J. (S.C.) 4n.10. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1284.11. *Gopalan v. State of Madras*, (1950) S.C.R. 88.11a. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510 (516).12. *Giri v. Dora*, A. 1959 S.C. 1319 (1325).13. *Sita Ram v. Banerjee*, A. 1958 All. 137.14. *F. N. Roy v. Collector of Customs*, (1957) S.C.R. 1151 : A. 1957 S.C. 648.15. *Babulal v. Collector of Customs*, (1957) S.C.R. 1110 : A. 1957 S.C. 877.16. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124.17. *Shama v. State of U. P.*, A. 1959 All. 57 (63).18. *Suraj Mall v. Viswanatha*, A. 1954 S.C. 545 : (1955) 1 S.C.R. 448.19. *Meenakshi Mills v. Viswanatha*, A. 1955 S.C. 13; *Muthiah v. Commr. of I. T.*, (1955) 2 S.C.R. 1247.20. *Bheshkar v. Commr. of I. T.*, A. 1959 S.C. 149.21. *Atlar Singh v. State of U. P.*, A. 1959 S.C. 564.22. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676.



**Vindhya Pradesh Abolition of Jagirs & Land Reforms Act, 1952:**  
*Held valid.*—Ss. 22, 37.<sup>22a</sup>

**Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 :**  
*Held valid.*—Entire Act.<sup>23</sup>

**15. (1)** The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

- (a) access to shops, public restaurants, hotels and places of public entertainment ; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) *Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*<sup>24</sup>

**Amendment.**—Cl. (4) was inserted by the **Constitution First (Amendment) Act, 1951.**

**Effect of amendment.**—See under cl. (4), *post*.

**Scope of Cl. (1): Prohibition of Discrimination.**

1. The scope of this clause is very wide. It is levelled against any State action relating to the citizens' rights, whether political, civil or otherwise.<sup>25</sup> Thus, a provision for communal representation on the basis of separate electorates according to communities offends against this clause and any election held in pursuance of such a law, after the commencement of the Constitution, must be held to be void.<sup>26</sup> A delimitation of constituencies intended to benefit a particular community would offend against this clause.<sup>27</sup>

2. And in view of the wide definition of the word 'State' in Art. 12, the prohibition extends to all representative, public bodies, such as municipal or local<sup>28</sup> bodies exercising 'authority' within the meaning of that Article.

22a. *State of M. P. v. Moradhwaj*, (1960) S.C.J. 9n.

23. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (634).

24. In its application in Jammu & Kashmir, the reference to 'Scheduled Tribes' shall be omitted from cl. (4) of Art. 15.

25. *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184 : (1952-54) C.C. 161.

1. *Bhopalsingh v. State of Rajasthan*, A. 1958 Raj. 41.

3. The fundamental right conferred by this clause is conferred on a citizen as an *individual* and is a guarantee against his being subjected to discrimination in the matter of his rights, privileges and immunities pertaining to him as a citizen generally.<sup>2</sup> The right conferred by Art. 15 is *personal*, and when one single citizen is discriminated against on the ground of caste, religion, etc., it is no answer to his application that other persons of the same caste or religion have been given the opportunity or privilege which has been denied to him.<sup>3</sup>

### 'The State'.

It has been held<sup>4</sup> that this Article applies to State-maintained but not State-aided educational institutions.

### 'Discrimination'.

'Discrimination', shortly speaking, means difference in treatment. The dictionary meaning of 'discriminate against' is "make an adverse distinction with regard to," "distinguish unfavourably from others."<sup>5</sup>

But the discrimination which is forbidden by this Article is only such discrimination as is based *solely* on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex, and on no other ground. A discrimination based on one or more of these grounds and *also on other grounds* is not hit by the Article.<sup>6,7</sup>

### 'Place of birth'.

1. These words occur in clauses (1) and (2) of Article 15 as well as in clause (2) of Article 16. These words in effect declare 'provincialism' to be unlawful. In no public matter is there to be any discrimination by any authority against a citizen of India on the ground of his *birth* in any particular part of India.<sup>8</sup>

2. Art. 15 (1), however, does not prohibit discrimination on the ground of *residence*; hence, it is constitutionally permissible for a State to prescribe that residents of the State would be entitled to a concession in the matter of fees in a State Medical College.<sup>9</sup>

### Scope of Clause (2).

1. Sub-clause (a) offers equal access to shops, restaurants, hotels and places of public entertainment, owned by *private* persons. State aid to such institutions is not a condition requisite for availability of this right in respect of such places. Sub-clause (b) relates to places of public resort which are (i) either maintained by State funds, wholly or in part; or (ii) dedicated to the use of the general public. In the latter case, maintenance by State funds is not necessary.

2. In short, the prohibition in cl. (2) is levelled not only against the State but also against private persons.

Thus, the reasonableness of a custom which restricted the use of a village well to certain families has been tested with reference to Art. 15 (2) (b); and such custom has been held to be unreasonable.<sup>10</sup>

2. *Champakam v. State of Madras*, A. 1951 Mad. 120.

3. *University of Madras v. Shanta*, A. 1954 Mad. 57.

4. *Jai Chand v. State of Punjab*, A. H.P. 9.

5. *Kathi Raning v. State of Saurashtra*, (1952) S.C.R. 435 (442).

6. *Anjali v. State of W. Bengal*, (1952) 56 C.W.N. 801.

7. *State v. Vithal*, (1952) 54 Bom. L.R. 626; *Dattatraya v. State of Bombay*, A. 1953 Bom. 311.

8. *State v. S. K. Hussein*, A. 1951 Bom. 265.

9. *Joshi v. State of M. B.*, (1955) S.C.R. 1215 (1220).

10. *Armugha v. Narayana*, A. 1958 Mad. 282.



**Scope of Clause (3): Special provision for women and children.**

1. This clause is an exception to the rule against discrimination provided by clauses (1) as well as (2).<sup>11</sup> Thus, the provision of maternity relief for women workers [Article 42] will not be a contravention of the prohibition against discrimination under clause (1) of the present Article; nor will be the provision of free education for children [Article 45] or measures for prevention of their exploitation [Article 39 (f)]. Similarly, the provision of separate accommodation, entrances, etc., for women and children at places of public resort will not be a violation of clause (2) of the present article.

2. But the special provisions referred to in cl. (3) need *not* be restricted to measures which are *beneficial* in the strict sense. Thus, it would support a provision like that in s. 497 of the Indian Penal Code which says that in an offence of adultery, though the man is punishable for adultery, the woman is not punishable as an abettor.<sup>12</sup>

**Provisions which have been held to be valid in view of Art. 15 (3).**

The following provisions, though discriminatory in favour of women or children, have been held to be valid, in view of Art. 15 (3):

- (i) S. 497, I.P.C.<sup>12</sup>
- (ii) Proviso to s. 497 (1), Criminal Procedure Code, making special treatment for women and children in the matter of granting bail.<sup>13</sup>
- (iii) S. 10 of the Divorce Act, 1869.<sup>14</sup>
- (iv) O. 25, r. 1 (3), C. P. Code,<sup>15</sup> authorising the Court to demand security for costs from woman plaintiff.
- (v) Reservation of seats for women in a local body.<sup>16</sup>

**Scope of cl. (4): Special provision for backward classes.**

1. The object of this clause, added in 1951, is to bring Arts. 15 and 29 in line with Arts. 16 (4), 46 and 340, and to make it constitutional for the State to *reserve* seats for backward classes of citizens, Scheduled Castes and Tribes in the public educational institutions,<sup>17</sup> as well as to make other special provisions as may be necessary for their advancement. The immediate object of this amendment was to override the decision in *State of Madras v. Champakam*<sup>18</sup> to the effect that Art. 29 (2) is not controlled by Art. 46 and that the Constitution does not intend to protect the interest of the backward classes in the matter of admission to educational institutions. But though the amendment would validate reservation for the backward classes and Scheduled Castes and Tribes, it would not support the distribution of seats according to communities so as to discriminate between classes who are not backward, *inter se*; in short, the amendment would not sanction any communal order.

2. Cl. (4) is an exception to cl. (1) which forbids discrimination on ground of 'race' or 'caste'. In *Jagwant v. State of Bombay*,<sup>19</sup> it was

11. *Dattatraya v. State of Bombay*, A. 1953 Bom. 311.

12. *Yusuf v. State of Bombay*, (1952-54) 2 C.C. 164 : (1950) S.C.R. 930.

13. *Choki v. State*, A. 1957 Raj. 10.

14. *Dwarka Bai v. Nainan*, A. 1953 Mad. 792.

15. *Mahadeb v. B. R. Sen*, A. 1951 Cal. 563.

16. *Dattatraya v. State of Bombay*, A. 1953 Bom. 311.

17. *Sudarsan v. State of A. P.*, A. 1958 A.P. 569.

18. *State of Madras v. Champakam*, (1951) S.C.R. 525.

19. *Jagwant v. State of Bombay*, A. 1952 Bom. 461.

held that acquisition of land for the establishment of a Harijan colony offended against Art. 15 (1). But this would be constitutional after the insertion of cl. (4) in Art. 15, as this is a provision for the 'advance-ment' of a backward class.

**Arts. 15 (4) and 29 (2).**—See under Art. 29 (2), *post*.

**16.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.  
 Equality of opportunity in matters of public employment.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3)<sup>20</sup> Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office *under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory* prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

**Amendment.**—The italicised words in cl. (3) were substituted for the words "under any State . . . . that State", by the Constitution (Seventh Amendment) Act, 1956.

#### Scope of Article 16.

1. Clauses (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment, *under the State*. Clauses (3)-(5), however, lay down several *exceptions* to the above rule of equal opportunity. These are :—

(i) Though any citizen of India, irrespective of his *residence*, is eligible for any office or employment under the Government of India [clause (2)], residence may be laid down as a condition for particular classes of employment under a State or any local authority therein, by an Act of Parliament in that behalf [clause (3)].

20. Cl. (3) shall have no application to Jammu & Kashmir [Constitution (Application to Jammu & Kashmir), Order, 1954].



(ii) The State (as defined in Article 12) may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State [clause (4)].

(iii) Offices connected with religious or denominational institutions may be reserved for members professing any particular religion or belonging to a particular denomination [clause (5)].

2. Cl. (4) only permits reservation for 'backward classes' of citizens who are not, in the opinion of the State, adequately represented in the services of the State. It does not permit reservation for any person who does not belong to the category of 'backward classes', nor does it enable the State to reserve posts on communal lines. A distribution<sup>21</sup> of offices amongst communities according to a fixed ratio or quota; or a provision for direct recruitment of persons 'to remove communal disparity'<sup>22</sup> infringes cls. (1) and (2) of Art. 16.

### CL. (1): 'Equality of opportunity'.

1. Art. 16 does not mean that Government are not, like other employers, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the Government.<sup>23</sup> It is also open to the appointing authority to lay down such prerequisite conditions of service as would be conducive to proper discipline amongst Government servants.<sup>24</sup>

2. This also holds good in the case of promotion or appointment of part-time servants to some whole-time posts. Just as Government may make it a condition that only those who had a satisfactory record in the past would be considered for promotion, so it is open to Government to lay down that only those part-time servants who had been amenable to proper discipline during their part-time employment should be considered eligible for appointment on a permanent basis. There is no denial of equal opportunity involved in such choice in the matter of recruitment.<sup>25</sup> The same principle applies in the matter of retrenchment.<sup>26, 27</sup>

3. Art. 16 is only an instance of the application of the general rule of equality laid down in Art. 14 and it should be construed as such. Thus, Guards and Road-Side Station-masters being two distinct and separate classes, a notification which prescribes a separate channel of promotion for Guards to higher grade Station-masters cannot be challenged as contravening Art. 16 (1).<sup>1</sup>

4. For the same reason, the selective test adopted by the Government shall be violative of Art. 16 if there is no relevant connection between the test and the efficient performance of the duties and obligations of the particular office.<sup>2</sup>

'Employment' or 'Appointment'. —These words do not, in the present context, include retrenchment<sup>3</sup> or 'retirement'.<sup>4</sup>

21. *Venkataramana v. State of Madras*, A. 1951 S.C. 229 : (1950-51) C.C. 37.

22. *State of J. & K. v. Jagar Nath*, A. 1958 J. & K. 14.

23. *Banarsidas v. State of U. P.*, (1956) S.C.R. 357 (361-2).

24. *Balbirsingh v. State of M. P.*, A. 1955 Nag. 289.

25. It has, however, been held by the Bombay High Court [*More v. Union of India*, A. 1959 Bom. 134] that Art. 16 is not inapplicable to termination of service, even though it is held at the pleasure of the Government under Art. 310.

1. *All India S. M.'s Assn. v. General Manager*, (1959) S.C. [Petr. 126/58].

2. *Sukhnandan v. State of Bihar*, A. 1957 Pat. 617.

3. *Rafkishore v. State of U. P.*, A. 1954 All. 343.

**'Employment or appointment to an office under the State'.**

1. The word 'employment' is to be read *ejusdem generis* with the word 'appointment' and in relation to the expression 'under the State'. These words denote that the Article has no application unless there is a relationship of employer and employee<sup>4</sup> or an element of subordination to the State or local authority, referred to in cl. (3). The Article has, therefore, no application in the matter of election of a Municipal councillor who cannot be said to be subordinate to the local authority.<sup>5</sup> Similarly, it cannot possibly apply to the admission of students to a State maintained or aided institution,<sup>6</sup> or to the engagement of contractors for the supply of goods for a price.<sup>7</sup>

2. But, subject to the above, the words 'employment' and 'appointment' connote two different conceptions. While 'appointment' refers to appointment to an 'office' and therefore implies the conception of tenure, duration, emoluments, and duties and obligations, fixed by law or some rule having the force of law, these elements are absent in the case of 'employment' which means a contract for temporary purposes, e.g., the engagement of labourers or professional experts by bilateral contracts.<sup>8</sup> But the word 'employment' in Art. 16(1) is not wide enough to include contracts which involves no element of service, e.g., contracts for the supply of goods to Government for a price.<sup>9</sup>

**Cl. (2): 'Only'.**

If the discrimination is on any ground other than those specified in this clause, it is not hit by it, e.g., a condition in the rules for recruitment to the State Judiciary that the candidates must be Advocates practising in the State.<sup>10</sup>

**Cl. (4): Reservation for backward classes.**

This clause is in the nature of an exception to cl. (1).<sup>11</sup>

**'Backward class'.**

In the absence of a definition, the expression would include all kinds of backwardness—social, educational or otherwise, and the State is the sole authority to classify communities as backward.<sup>12</sup>

**'Provision'.**

This word, read with the word 'State', cannot mean provision by the Legislature only. On the other hand, it is an enabling provision and it is not obligatory for the Government to make any such provision.<sup>13</sup>

**17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.**

Abolition of  
Untouchability.

4. *Achutan v. State of Kerala*, A. 1959 S.C. 490 (492).

5. *Dattatraya v. State of Bombay*, A. 1953 Bom. 311.

6. *Om Prakash v. The State*, A. 1951 Punj. 93.

7. *Sukhnandan v. State of Bihar*, A. 1957 Pat. 617.

8. *Bhaktavatsalam v. Andhra P. S. C.*, A. 1956 Andhra 14.

9. *Kesava v. State of Mysore*, A. 1956 Mys. 20 (24, 28).



**'Untouchability'.**

The word 'untouchability' has not, however, been defined by the Act just as there is no definition in the Constitution. A Single Judge of the Mysore High Court<sup>10</sup> has held that 'untouchability' in the Act refers to the social disabilities historically imposed on certain classes of people by reason of their *birth* in certain castes and would not include an instigation of social boycott by reason of the *conduct* of certain persons.<sup>11</sup> The word 'Harijan' *prima facie* refers to an untouchable.

**'In accordance with law'.**

Under the present Article, read with Art. 35 (a) (iii), Parliament has enacted the Untouchability (Offences) Act, 1955, which must be read along with the present Article :

**THE UNTOUCHABILITY (OFFENCES) ACT, 1955.**

An Act to prescribe punishment for the practice of "Untouchability", for the enforcement of any disability arising therefrom and for matters connected therewith.

Enacted by Parliament in the Sixth Year of the Republic of India as follows :—

1. *Short title, extent and commencement.*—(1) This Act may be called the Untouchability (Offences) Act, 1955.

(2) It extends to the whole of India.

(3) It shall come into force on such date<sup>12</sup> as the Central Government may, by notification in the Official Gazette, appoint.

2. *Definition.*—In this Act, unless the context otherwise requires,—

(a) 'hotel' includes a refreshment room, a boarding house, a lodging house, a coffee house and a cafe;

(b) 'place' includes a house, a building, a tent, and a vessel;

(c) 'place of public entertainment' includes any place to which the public are admitted and in which an entertainment is provided or held.

*Explanation.*—'Entertainment' includes any exhibition, performance, game, sport and any other form of amusement;

(d) 'place of public worship' means a place, by whatever name known, which is used as a place of public religious worship or which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section thereof, for the performance of any religious service, or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place;

(e) 'shop' means any premises where goods are sold either wholesale or by retail or both wholesale and by retail and includes a laundry, a hair cutting saloon and any other place where services are rendered to customers.

10. *Devarajiah v. Padmanna*, A. 1958 Mys. 84.

11. A restrictive meaning might be justified inasmuch as the Court was interpreting a penal statute; but a restricted meaning was not perhaps contemplated by Art. 17 itself as would appear from the use of the word 'in any form'. It is difficult to imagine that the framers of the Constitution intended to leave social boycott untouched when it was obviously liable to be used as an engine of oppression against people of the weaker classes. Perhaps Parliament will soon have to attend to this loophole in the Act.

12. 1st June, 1955, *vide* Notification No. S.R.O. 1109, dt. 23-5-55, Gazette of India, Extraordinary, 1955 Pt. II, Section 3, p. 971.

3. *Punishment for enforcing religious disabilities.*—Whoever on the ground of "untouchability" prevents any person—

(a) from entering<sup>13</sup> any place of public worship which is open to other persons professing the same religion<sup>14</sup> or belonging to the same religious denomination or any section thereof, as such person; or

(b) from worshipping or offering prayers or performing any religious service in any place of public worship, or bathing in, or using the waters of, any sacred tank, well, spring or water-course, in the same manner and to the same extent as is permissible to other persons professing the same religion, or belonging to the same religious denomination or any section thereof, as such person; shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

*Explanation.*—For the purposes of this section and section 4 persons professing the Buddhist, Sikh or Jaina religion or persons professing the Hindu religion in any of its forms or developments including Virashaivas, Lingayats, Adivasis, followers of Brahmo, Prarthana, Arya Samaj and the Swaminarayan Sampraday shall be deemed to be Hindus.

4. *Punishment for enforcing social disabilities.*—Whoever on the ground of "untouchability" enforces against any person any disability with regard to—

(i) access to any shop, public restaurant, hotel or place of public entertainment; or

(ii) the use of any utensils, and other articles kept in any public restaurant, hotel, *dharmshala*, *sarai* or *musafirkhana* for the use of the general public or of persons professing the same religion, or belonging to the same religious denomination or any section thereof, as such person; or

(iii) the practice of any profession or the carrying on of any occupation, trade or business; or

(iv) the use of, or access to, any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing ghat, burial or cremation ground, any sanitary convenience, any road, or passage, or any other place of public resort which other members of the public, or persons professing the same religion or belonging to the

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13. The right of entry into the place of public worship would not, however, include right to enter into the place where the idol is seated at any hour of the day. If the caste Hindus are not entitled to visit such place during particular hours, e.g., when food is offered to the Deity or the Deity retires, an 'untouchable' cannot claim to do so, for his right under s. 3 (a) is only the same as that of any other member of the same religion or religious denomination [*Baji Mahapatra v. Dominion of India*, A.I.R. 1951 Orissa 146; cf. *Commr. H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191].

14. Under the corresponding provision of the Bombay Harijan Temple Entry Act, 1947, it was held that the Act did not obliterate the distinction between Hindus and Jains, so that neither a caste Hindu nor a Hindu Harijan could claim a right of entry into a Jain temple [*Bhaichand v. State of Bombay*, A. 1952 Bom. 233].

But the Explanation to s. 3 of the present Act is differently worded than, the definition of Hindu in the Bombay Act. A Sikh or Jain is 'deemed to be a Hindu' for the purposes of this Act. In the result, a Hindu and a Jain shall be deemed to be persons professing the same religion for the purposes of s. 3 (a) and, accordingly, a Scheduled Caste belonging to the Hindu community cannot be denied entry into a Jain temple.



same religious denomination or any section thereof, as such person, have a right to use or have access to; or

(v) the use of, or access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds or dedicated to the use of general public, or persons professing the same religion, or belonging to the same religious denomination or any section thereof, as such person; or

(vi) the enjoyment of any benefit under a charitable trust created for the benefit of the general public or of persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; or

(vii) the use of, or access to, any public conveyance; or

(viii) the construction, acquisition, or occupation of any residential premises in any locality, whatsoever; or

(ix) the use of any *dharmashala*, *sarai* or *musafirkhana* which is open to the general public, or to persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; or

(x) the observance of any social or religious custom, usage or ceremony or taking part in any religious procession; or

(xi) the use of jewellery and finery;

shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

5. *Punishment for refusing to admit persons to hospitals, etc.*—Whoever on the ground of "untouchability"—

(a) refuses admission to any person to any hospital, dispensary, educational institution or any hostel attached thereto, if such hospital, dispensary, educational institution or hostel is established or maintained for the benefit of the general public or any section thereof; or

(b) does any act which discriminates against any such person after admission to any of the aforesaid institutions;

shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

6. *Punishment for refusing to sell goods or render services.*—

Whoever on the ground of "untouchability" refuses to sell any goods or refuses to render any service to any person at the same time and place and on the same terms and conditions at or on which such goods are sold or services are rendered to other persons in the ordinary course of business shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

7. *Punishment for other offences arising out of "untouchability".*—

(1) Whoever—

(a) prevents any person from exercising any right accruing to him by reason of the abolition of "untouchability" under Article 17 of the Constitution; or

(b) molests, injures, annoys, obstructs or causes or attempts to cause obstruction to any person in the exercise of any such right or molests, injures, annoys or boycotts any person by reason of his having exercised any such right; or

(c) by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practise "untouchability" in any form whatsoever;

shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

*Explanation.*—A person shall be deemed to boycott another person who—

(a) refuses to let to such other person or refuses to permit such other person, to use or occupy any house or land or refuses to

deal with, work for, hire for, or do business with, such other person or to render to him or receive from him any customary service, or refuses to do any of the said things on the terms on which such things would be commonly done in the ordinary course of business; or

(b) abstains from such social, professional or business relations as he would ordinarily maintain with such other person.

(2) Whoever—

(i) denies to any person belonging to his community or any section thereof any right or privilege to which such person would be entitled as a member of such community or section, or

(ii) takes any part in the ex-communication of such person, on the ground that such person has refused to practise "untouchability" or that such person has done any act in furtherance of the objects of this Act, shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

8. *Cancellation or suspension of licences in certain cases.*—When a person who is convicted of an offence under section 6 holds any licence under any law for the time being in force in respect of any profession, trade, calling or employment in relation to which the offence is committed, the court trying the offence may, without prejudice to any other penalty to which such person may be liable under that section, direct that the licence shall stand cancelled or be suspended for such period as the court may deem fit, and every order of the court so cancelling or suspending a licence shall have effect as if it had been passed by the authority competent to cancel or suspend the licence under any such law.

*Explanation.*—In this section, 'licence' includes a permit or a permission.

9. *Resumption or suspension of grants made by Government.*—Where the manager or trustee of a place of public worship which is in receipt of a grant of land or money from the Government is convicted of an offence under this Act and such conviction is not reversed or quashed in any appeal or revision, the Government may, if in its opinion the circumstances of the case warrant such a course, direct the suspension or resumption of the whole or any part of such grant.

10. *Abetment of offence.*—Whoever abets any offence under this Act shall be punishable with the punishment provided for the offence.

11. *Enhanced penalty on subsequent conviction.*—Whoever having already been convicted of an offence under this Act or of an abetment of such offence is again convicted of any such offence or abetment, shall, on every such subsequent conviction, be punishable with both imprisonment and fine.

12. *Presumption by courts in certain cases.*—Where any act constituting an offence under this Act is committed in relation to a member of a Scheduled Caste as defined in clause (24) of Article 366 of the Constitution, the court shall presume, unless the contrary is proved, that such act was committed on the ground of "untouchability".

13. *Limitation of jurisdiction of civil courts.*—(1) No civil court shall entertain or continue any suit or proceeding or shall pass any decree or order or execute wholly or partially any decree or order if the claim involved in such suit or proceeding or if the passing of such decree or order or if such execution would in any way be contrary to the provisions of this Act.

(2) No court shall, in adjudicating any matter or executing any decree or order, recognise any custom or usage imposing any disability on any person on the ground of "untouchability".



**14. Offences by companies.**—(1) If the person committing an offence under this Act is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company, for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent of any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purposes of this section.

(a) 'company' means any body corporate and includes a firm or other association of individuals; and

(b) 'director' in relation to a firm means a partner in the firm.

**15. Offences under the Act to be cognizable and compoundable.**—Notwithstanding anything contained in the Code of Criminal Procedure, 1898—

(a) every offence under this Act shall be cognizable; and

(b) every such offence may, with the permission of the court be compounded.

**16. Act to override other laws.**—Save as otherwise expressly provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of any court or other authority.

**17. Repeal.**—The enactments specified in the Schedule are hereby repealed to the extent to which they or any of the provisions contained therein correspond or are repugnant to this Act or to any of the provisions contained therein.

## THE SCHEDULE

(See section 17)

1. The Bihar Harijan (Removal of Civil Disabilities) Act, 1949 (Bihar Act 19 of 1949).
2. The Bombay Harijan (Removal of Social Disabilities) Act, 1946 (Bombay Act 10 of 1947).
3. The Bombay Harijan Temple Entry Act, 1947 (Bombay Act 35 of 1947).
4. The Central Provinces and Berar Scheduled Castes (Removal of Civil Disabilities) Act, 1947 (Central Provinces and Berar Act 24 of 1947).
5. The Central Provinces and Berar Temple Entry Authorisation Act, 1947 (Central Provinces and Berar Act 41 of 1947).
6. The East Punjab (Removal of Religious and Social Disabilities) Act, 1948 (East Punjab Act 14 of 1948).
- \*7. The Madras Removal of Civil Disabilities Act, 1938 (Madras Act 21 of 1938).
8. The Orissa Removal of Civil Disabilities Act, 1946 (Orissa Act 11 of 1946).

9. The Orissa Temple Entry Authorisation Act, 1948 (Orissa Act 11 of 1948).
10. The United Province Removal of Social Disabilities Act, 1947 (U.P. Act 14 of 1947).
11. The West Bengal Hindu Social Disabilities Removal Act, 1948 (West Bengal Act 37 of 1948).
12. The Hyderabad Harijan Temple Entry Regulation, 1358F (No. 55 of 1358 Fasli).
13. The Hyderabad Harijan (Removal of Social Disabilities) Regulation, 1358F (No. 56 of 1358 Fasli).
14. The Madhya Bharat Harijan Ayogta Nivaran Vidhan, Samvat 2005 (Madhya Bharat Act No. 15 of 1949).
15. The Removal of Civil Disabilities Act, 1943 (Mysore Act 42 of 1943).
16. The Mysore Temple Entry Authorisation Act, 1948 (Mysore Act 14 of 1948).
17. The Saurashtra Harijan (Removal of Social Disabilities) Ordinance (No. XL of 1948).
18. The Travancore-Cochin Removal of Social Disabilities Act, 1125 (Travancore-Cochin Act 8 of 1125).
19. The Travancore-Cochin Temple Entry (Removal of Disabilities) Act, 1950 (Travancore-Cochin Act 27 of 1950).
20. The Coorg Scheduled Castes (Removal of Civil and Social Disabilities) Act, 1949 (Coorg Act I of 1949).
21. The Coorg Temple Entry Authorisation Act, 1949 (Coorg Act 2 of 1949).

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

Abolition of titles. (2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

### *Rights to Freedom*

19.<sup>13</sup> (1) All citizens shall have the right—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely throughout the territory of India ;

Protection of certain rights regarding freedom of speech, etc.

15. In its application to the State of Jammu and Kashmir, for a period of five years from the 14th May, 1954, article 19 shall be subject to the following modifications :—

"(i) in clauses (3) and (4), after the words "in the interests of", the words "the security of the State or" shall be inserted;



(e) to reside and settle in any part of the territory of India ;

(f) to acquire, hold and dispose of property ; and

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, in relation to contempt of court, defamation or incitement to an offence.*

(3) *Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*

(4) *Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*

(5) *Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.*

(6) *Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—*

*(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or*

*(ii) in clause (5), for the words "or for the protection of the interests of any Scheduled Tribe", the words "or in the interests of the security of the State" shall be substituted; and*

*(iii) the following new clause shall be added, namely :—*

*'(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.'*

- (ii) *the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.*

**Amendment.**—The Constitution (First) Amendment Act, 1951, which came into force on 18-6-51 amended two clauses of Art. 19, viz.—Cls. (2) and (6), as shown in italics.

**Objects of amendment.**—See under cls. (2) and (6), *post*.

**Object of Art. 19(1): A guarantee against State action.**

Art. 19 (1) guarantees certain fundamental rights, subject to the power of the State to impose restrictions on the exercise of those rights. The Article was thus intended to protect these rights against *State action* other than in the legitimate exercise of its power to regulate private rights in the public interest. Violation of rights of property by individuals is not within the purview of the Article.<sup>16</sup>

### Arts 19, 21-22.

1. The rights conferred by Art. 19 are the rights of free men and a person whose personal liberty has been taken away under a valid law of punitive (Art. 21) or preventive (Art. 22) detention cannot complain of the infringement of any of the fundamental rights under Art. 19.<sup>17-18</sup>

2. Art. 19 has no application to a legislation dealing with preventive (Art. 22) or punitive (Art. 21) detention as its *direct object*.<sup>19-20</sup>

### 'All citizens'.

The rights conferred by Art. 19 are not available to any person who is not a 'citizen of India'.<sup>21</sup>

**Whether a corporation can be a citizen within the meaning of Art. 19.**

This question has not yet been finally settled.<sup>22</sup> *Prima facie*, Arts. 5, 6 and 8 indicate that it is only natural persons who can be citizens.<sup>23</sup>

Nevertheless, it has been held that a corporation, whose shareholders are citizens<sup>24</sup> and which has a domicile in this country i.e., incorporated in India<sup>25</sup> is capable of exercising fundamental rights excepting those which are inherently of such a nature that they cannot possibly be exercised by an artificial person.<sup>1</sup> Thus, such a corporation can complain if its fundamental right of association,<sup>2</sup> property,<sup>24, 2</sup> or business<sup>24</sup> is infringed, but not freedom of speech.<sup>2</sup>

16. *Samdasani v. Central Bank of India*, A. 1952 S.C. 59 : (1950-51) C.C. 68.

17. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

18. *Collector of Malabar v. Hafee*, (1957) S.C.R. 970.

19. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (618) : (1959) S.C.R. 12.

20. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (133).

21. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1298).

22. *Cf. Sewpujanrai v. Collector of Customs*, A. 1958 S.C. 845 (856).

23. *Jupiter Ins. Co. v. Rajagopalan*, A. 1952 Panj. 9 (18).

24. *State of Bombay v. Chamurbaugalla*, A. 1956 Bom. 1 (19).

25. *E. O. Line v. Jasjit*, A. 1959 Cal. 287 (289).

1. *Chitranjit Lal v. Union of India*, (1950) S.C.R. 869 (898) : (1950-51) C.C. 10 (12).

2. *Narayanprasad v. Indian Iron Co.*, A. 1953 Cal. 696.

3. *Amrita Bazar Patrika v. Board of Exam.*, A. 1955 All. 595.



The position has been **substantially affected** by the enactment of the Citizenship Act, 1955, which governs the acquisition of citizenship subsequent to January 26, 1950. Since all the provisions of this Act relate to natural persons<sup>4</sup>, it follows that it is not possible for a corporation to acquire Indian citizenship subsequent to 26-1-50. No doubt the position has become anomalous in view of the judicial decisions noted above.

#### Nature of the rights that are guaranteed by Art. 19.

1. From its several clauses, it will appear that Art. 19 is confined to what are known as *civil* rights as distinguished from *political* rights, such as the right to vote or hold any political office.

2. Again, Art. 19 refers to what are known as natural or common law rights as distinguished from rights which are *created* by a statute.<sup>5</sup> A right which is created by a statute must be exercised subject to the conditions imposed by that statute and no question of infringement of fundamental rights arises in such cases. Art. 19 (1) guarantees—

“those great and basic rights which are recognised and guaranteed as the *natural rights inherent in the status of a citizen of a free country*.”

3. Where a right is created by statute, it can be taken away by the Legislature, but when a right is ‘fundamental’ it cannot be taken away by the Legislature and can be subjected to such restrictions only as are permitted by the Constitution itself e.g., on the grounds specified in cls. (2)-(6) of Art. 19.<sup>6</sup>

#### The limitations in cls. (2)-(6).

(i) There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control—Art. 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare of general morality.<sup>7</sup>

(ii) Whether any law has in fact transgressed the limitations specified in cls. (2)-(6) of Art. 19 is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by cls. (2) to (6) whichever is applicable, the Court will declare the same to be unconstitutional and, therefore, void under Art. 13. Here there is scope for the application of the “intellectual yardstick” of the Court. If, however, the Court finds, on scrutiny, that

4. As defined in s. 2 (f) of the Act (see p. 10, ante).

5. Cf. *Kulkarni v. State of Bombay*, A. 1951 Bom. 106; *Mulchand v. Mukund*, A. 1952 Bom. 299; *Ananthakrishnan v. State of Madras*, A. 1952 Mad. 395 (402).

6. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587.

7. *Pannalal v. Union of India*, (1957) S.C.R. 233 (261).

8. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (253-4), *Mukherjea J.*

the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not.<sup>10</sup>

(iii) In the expression of 'reasonable restrictions' in cls. (2)-(6) of Art. 19, the adjective 'reasonable' is predicated of the 'restrictions' that are imposed by the law and not of the law itself. The issue to be decided by the Court is whether the restrictions imposed by the impugned legislation on the *exercise of the right* are reasonable.<sup>11</sup>

### Who can impose restrictions under cls. (2)-(6).

The restrictions may be imposed by any of the authorities who are included in the definition of 'State' in Art. 12 [p. 18, *ante*], who are competent to make a 'law' as it is understood in the wider sense referred to in Art. 13 (3)(a).

### 'Law'.

1. From the language of cls. (2)-(6) it is clear that the restrictions referred to in these clauses can be imposed only by law, including, of course, valid subordinate legislation.<sup>12</sup> But without legislative authority, the Executive cannot impose any restriction upon any of the fundamental rights guaranteed by Art. 19 (1).<sup>13</sup>

2. In order to justify a restriction under cls. (2)-(6), the law which imposes the restriction must be otherwise *valid*. A restriction which is not authorised by a valid law cannot be saved by any of these clauses.<sup>14</sup>

3. In the case of subordinate legislation, the procedure required by the statute must be complete before it can be defended under cls. (2)-(6). Thus, cl. 4 of the Non-Ferrous Metal Control Order, 1958 has been invalidated on the ground that a notification as required by s. 3 (5)-(6) of the Essential Commodities Act, 1955 had not been made.<sup>15</sup>

**The restriction must be related to one of the grounds specified in the limitation clauses.**

1. Once it is held that Art. 19 is applicable and a fundamental right enumerated therein has been infringed, the only thing which can save the law from constitutional invalidity is if it comes within any of the exceptions enumerated in cls. (2) to (6) of Art. 19.<sup>16</sup>

2. The restrictive clauses in cls. (2)-(6) are exhaustive and are to be strictly construed. The fundamental rights declared by the various sub-clauses of cl. (1) cannot be curtailed on any ground outside the relevant provisions of cls. (2)-(6).<sup>17</sup> A law imposing restriction upon any of the rights guaranteed by cl. (1) must be declared invalid by the Court unless it falls under any of the grounds specified in the relevant limitation clause, e.g., cl. (2) in the case of freedom of speech and expression.<sup>17, 18</sup>

9. *Ibid.*, Das J.

10. *Khare v. State of Delhi*, (1950) S.C.R. 519.

11. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 : (1950-51) C.C. 61; *Tahir v. Dt. Board*, (1952-4) 2 C.C. 234.

12. *Ganapali v. State of Ajmer*, (1955) 2 S.C.R. 1065.

13. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 : (1952-54) 2 C.C. 212 : A. 1952 S.C. 115.

14. *Narinder v. Union of India*, (1960) S.C.J. 214.

15. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (76), Kania C.J., affirmed by *Ram Singh v. State of Delhi*, (1951) S.C.R. 451 : (1950-51) C.C. 158 (160).

16. *Ram Manohar v. Supdt.*, A. 1955 All. 195.

17. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (618).

18. *Supdt. v. Ram Manohar*, 1960 S.C. [unreported].

19. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (578).



3. The relationship between the impugned legislation and any of the relevant specified grounds must be *rational*<sup>20</sup> or *proximate*.<sup>21</sup> This also follows from the expression 'in the interests of'<sup>22</sup> which occurs in each of the limitation clauses (2)-(6).

#### Illustrations.

(i) Scurrilous attacks upon a Judge, however gross it might be, cannot be restricted 'in the interest of *'public order'*'. Even though such statements are likely to undermine the confidence of the public in the proper administration of justice, it is too remote a thing to say that the security of the State or maintenance of law and order would be endangered thereby.<sup>23</sup>

(ii) Uttering abusive or defamatory slogans against a Minister cannot be penalised on the ground of public order unless there is clear evidence that the utterances would lead to a reasonable apprehension of breach of the peace.<sup>24</sup>

(iii) The U. P. Government enhanced the irrigation rates for water supplied from canals to cultivators. The Socialist Party of India resolved to start an agitation against the enhancement. Pursuant to the policy of the party Dr. Ram Manohar Lohia, General Secretary of the party, addressed two public meetings instigating the audience not to pay enhanced irrigation rates. He was arrested and two days later the magistrate went to the jail to try him for the offence under s. 3 of the U. P. Special Powers Act, 1932 which provides—

"Whoever by words...or by signs...or otherwise instigates expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, shall be punishable with imprisonment..."

'Liability' is defined to include any tax, rate, cess, rent, land revenue and anything recoverable as land revenue. Dr. Lohia challenged the validity of the above provision, in a petition for *habeas corpus*. Affirming the decision of the High Court, the Supreme Court held that the restriction imposed by the section could not be upheld on the ground of being "in the interests of public order" within the meaning of cl. (2) of Art. 19 and was void.

It was observed that no person, whether legal adviser or a friend or a well-wisher of a person instigated could escape the tentacles of Section 3, though in fact the rent due had been collected through coercive process or otherwise. Thus, even innocuous speeches were prohibited by threat of punishment. There was no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section. Unless there was a proximate connection between the instigation and the public order, the restriction was neither reasonable nor was it in the interest of public order, and must be struck down.<sup>25</sup>

4. But once the connection between the restrictive legislation and the permissible ground is rational, the Legislature has the discretion as to the expediency of the *stage* at which the restriction is to be applied. Thus, it is not prevented to provide against threatened or apprehended injury as distinguished from an actual injury.<sup>24,25</sup>

20. Cf. *R. v. Basudev*, A1950 F.C. 67 (69).

21. *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276.

22. Cf. *Kartar Singh v. State of Punjab*, A. 1956 S.C. 541.

23. *Supdt. v. Ram Manohar*, (1960) S.C. [unreported], affirming *Ram Manohar v. Supdt.*, A. 1955 All. 193.

24. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (899).

25. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620.

*Illustrations.*

The expression 'in the interests of public order' has a wider meaning than the expression 'for the maintenance of public order', and authorises the Legislature to impose restrictions on utterances which have a *tendency* to cause public disorder<sup>25a</sup> or to excite religious disaffection which has a proximate tendency to cause public disorder.<sup>25b</sup>

**What constitutes a restriction.**

1. When a law is impugned as having imposed a restriction upon a fundamental right, what the Court has to examine is the *substance* of the legislation, without being beguiled by the mere appearance of the legislation.<sup>1</sup> The Legislature cannot disobey the constitutional prohibitions by employing an *indirect* method.<sup>2</sup> The legislative power being subject to the fundamental rights, the Legislature cannot indirectly take away or abridge the fundamental rights which it cannot do directly.<sup>3</sup>

2. On the other hand, the *effects* of the legislation are relevant for this purpose only in so far as they are the direct and inevitable consequences or the effects which could be said to have been in the contemplation of the Legislature. The *possible* or *remote* effects of a legislation upon any particular fundamental right cannot be said to constitute a restriction upon that right.<sup>4</sup>

*Illustration.*

The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, has for its object the regulation of the conditions of service of the workmen employed in the newspaper industry with a view to ameliorating such conditions.

It was argued that as a result of the regulation made in pursuance of the Act, the employers who were marginally situated might not be able to bear the burden and might have to close down their establishments, and would thus result in the curtailment of circulation of news. *Held*, that such consequences were not inevitable but depended on various factors which may or may not come into play. A possible eventuality of this type could not be said to have been in the contemplation of the Legislature. The impugned law, therefore, could not be said to constitute a restriction upon the freedom of speech and expression, though it might be a restriction upon some other right guaranteed by Art. 19 (1).<sup>5</sup>

**What is 'reasonable' restriction.**

1. The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision of the Court.<sup>6</sup>

2. Though the Court starts with the assumption that the Legislature is the best judge of what is good for its community by whose suffrage it comes into existence, the ultimate responsibility of determining the reasonableness of the restriction, from the point of view of the interests of the general public rests with the Court and the Court cannot shirk this solemn duty cast on it by the Constitution.<sup>7</sup>

25a. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (899).

25b. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620.

1. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (619).

2. *Dwarkadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C.R. 674 (683).

3. *Kerala Education Bill, in re*, A. 1958 S.C. 956 (985).

4. *Chintamanrao v. State of M. P.*, (1952) S.C.R. 750; (1950-51) C.C. 64: A. 1951 S.C. 118.

5. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.



3. The expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-cl. of cl. (1) of Art. 19 and the social control permitted by any of the cl. (2) to (6). It connotes that the limitation imposed on a person in enjoyment of the right, should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public.<sup>6</sup> In order to be reasonable the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object.<sup>7,8</sup>

4. It follows that the reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations.<sup>9</sup>

5. The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. Thus, the formula of subjective satisfaction of the Government and its officers with an advisory Board to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances (e.g., in law providing internment or externment for the security of the State), and within the narrowest limits, and not to curtail a right like the freedom of association, in the absence of any emergent or extraordinary circumstances.<sup>10</sup>

6. In judging the reasonableness of a law, the Court will necessarily see, not only the surrounding circumstances but all *contemporaneous legislation* passed as part of a *single scheme*. It is the reasonableness of the restriction and not of the law that has to be found out, and if the Legislature imposes a restriction by one law but creates countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account.<sup>11</sup> The Courts can take judicial notice of such Acts forming part of the same legislative plan, under which restrictions are imposed by one Act and countervailing advantages are created by another.<sup>12</sup>

7. The restriction must be reasonable from the *substantive* as well as *procedural standpoints*. It is not possible to formulate an effective test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice.<sup>13</sup>

6. *Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 803 : (1952-4) 2 C.C. 221 (223) : A. 1954 S.C. 224.

7. *Chintamanrao v. State of M. P.*, (1952) S.C.R. 759 : (1950-51) C.C. 64 : A. 1951 S.C. 118.

8. *Arunachala v. State of Madras*, A. 1959 S.C. 300 (303).

9. *State of Madras v. Row*, (1952) S.C.R. 597 (607) : A. 1952 S.C. 196.

10. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1132).

11. *Khare v. State of Delhi*, (1950) S.C.R. 519; *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 (742).

### Substantive and Procedural Reasonableness.

The substantive and procedural aspects of reasonableness may be illustrated as follows :

#### (A) Substantive aspect.

1. A penal law which is so vague and uncertain that it gives no notice to the accused as to what act or conduct would constitute the offence, or which imposes vicarious criminal liability, is unreasonable from the substantive point of view.<sup>12</sup>

2. In a law providing for externment, whether the law itself is permanent or temporary or the period of externment authorised is a long or a short one, constitutes the substantive aspect of the restriction.<sup>13</sup>

3. Restrictions, which are imposed for securing the objects which are enjoined by the Directive Principles of State Policy included in Part IV of the Constitution, may be regarded as 'reasonable' restrictions within the meaning of cls. (2)-(6) of Art. 19.<sup>14</sup>

#### (B) Procedural aspect.

Whether a restriction upon the exercise of a fundamental right is to be imposed on hearing the person affected or on the subjective satisfaction of the authority, constitutes the procedural test.<sup>15</sup>

Thus, a law which empowers the Executive

- (i) to impose a collective fine,<sup>16</sup> or
- (ii) to suppress an association<sup>17</sup>, or
- (iii) to restrict the enjoyment of the proprietary rights of an individual,<sup>18</sup>

on subjective satisfaction, is unreasonable from the procedural standpoint.

**How far it would be reasonable to make the exercise of a fundamental right dependent on the subjective satisfaction of the Executive.**

1. In determining the reasonableness of the restriction imposed by a law, one of the tests which has been applied by our Courts is—whether the restriction is to be imposed by the authority who is empowered by the Legislature, subjectively or objectively. A 'subjective' decision is the decision of the person who makes it, solely on his own satisfaction, and the reasonableness of his satisfaction cannot be tested by the Court. An 'objective' decision, on the other hand, is one which is arrived at by the application of some external standard other than the personal satisfaction of the authority who makes the decision and because it is made according to an objective standard, the reasonableness of the decision can be tested by the Court, on the application of the same objective standard, for instance, whether a particular conclusion follows from the evidence placed before the authority.<sup>19</sup>

2. No absolute answer can, however, be given to the question whether a restriction would invariably be unreasonable if the authority is empowered to impose it on its subjective satisfaction.

12. *Ajablal v. State of Bihar*, A. 1956 Pat. 137 (139).

13. *Khare v. State of Delhi*, (1950) S.C.R. 519.

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682 : (1950-51) C.C. 308.

15. *Ajablal v. State of Bihar*, A. 1956 Pat. 137 (140).

16. *State of Madras v. Row*, (1952) S.C.R. 597.

17. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049.

18. *Benarasi v. State of Pepsu*, A. 1957 Pepsu 5 (9).



The answer to this question depends on the *nature* of the right and the *circumstances* calling for the restriction.<sup>13</sup> Thus, it has been held that—

(I) (a) A law providing *externment* or internment<sup>12</sup> for the security of the State is not an 'unreasonable' restriction of the freedom of movement guaranteed by Art. 19 (1) (d) merely because it leaves the necessity of making the order of externment in any case, to the subjective satisfaction of a particular officer. The Supreme Court, viewed the necessity of externment in the same light as the law of preventive detention.<sup>14</sup>

(b) Similarly, in the case of a business or occupation which is *inherently dangerous* or harmful to the community, it would not be unreasonable to subject the right to carry on such business or occupation to the supervision or control of an officer acting in his discretion,<sup>15</sup> and give him final power to determine the fitness of persons entitled to a licence to carry on such trade.<sup>1</sup>

(c) Similar view has been taken as regards a law which empowers the State to take emergent action relating to private property in the interests of public safety, e.g., to pull down a dangerous building.<sup>2</sup>

(d) A law which authorises the head of the Police to make orders prohibiting processions whenever he considers it necessary for the preservation of public order is not unreasonable because the power is to be exercised by the Police officer on his subjective satisfaction.<sup>3</sup>

(e) Similar view has been taken as regards a law which empowers the State Government or its delegate (on its subjective satisfaction) to prohibit, for a limited period, the publication in or importation into, a particular area of matters prejudicial to the maintenance of *communal harmony* affecting or likely to affect *public order*, because the mischief to be averted demands quick and effective decision.<sup>4</sup>

In such cases, mere *possibility* of abuse of the power by the Executive is no test for determining the reasonableness of the restriction imposed by the law itself.<sup>3,4</sup>

On the contrary, it is to be presumed that a public authority will act honestly and reasonably in the exercise of its statutory powers.<sup>7,8</sup> The presumption is, of course, rebuttable. If, however, the statutory power or discretion is *shown* to have been abused by the authority, by exercising it contrary to the policy laid down by the law, the person aggrieved shall have his remedy against the illegal order, but that would be no ground for invalidating the statute itself.<sup>6</sup>

(II) On the other hand, the Supreme Court has held<sup>9</sup> that in the absence of emergent or extraordinary circumstances, the exercise of a basic right like the right of *association* or property<sup>10</sup> or to reside in

19. *Gopalan v. State of Madras*, (1950-51) C.C. 74 : (1950) S.C.R. 88.

20. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873 : (1952-4) 2 C.C. 227 (229).

1. *Ghaiomal v. State of Delhi*, A. 1956 Punj. 97.

2. *Nathubhai v. Municipal Corpn.*, (1958) 60 Bom. L.R. 515 (531).

3. *Bapurao v. State*, A. 1956 Bom. 300 (302).

4. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (901).

5. *Khare v. State of Delhi*, (1950-51) C.C. 52 : (1950) S.C.R. 519.

6. *Harishankar v. State of M. P.*, (1952-54) 2 C.C. 510 (513).

7. *State of W. B. v. Anwarali*, (1952-54) 2 C.C. 50 : (1952) S.C.R. 284.

8. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 675 : (1956) S.C.R. 393.

9. *State of Madras v. Row*, (1952) S.C.R. 597 : (1952-4) 2 C.C. 169 : A. 1952 S.C. 196.

10. *Raghunath v. Court of Wards*, (1952-54) 2 C.C. 187 : A. 1953 S.C. 373.

any part of India<sup>11</sup> or to carry on a lawful business<sup>12</sup> could not be reasonably made dependent upon the subjective satisfaction of the Government or any of its officers.

But the power to *initiate* proceedings<sup>13</sup> should be distinguished from the power to *decide* an action encroaching upon a fundamental right.

(III) The vesting of an unrestricted discretion in the Executive to grant ad hoc exemptions from the operation of a law is *prima facie* unreasonable.<sup>14</sup>

**The discretion is not unguided or unfettered where the Legislature has laid down the policy or standard.**

1. When the policy<sup>15,16</sup> according to which or the purpose<sup>17</sup> for which a discretion is to be exercised by an officer is clearly expressed in the statute, it cannot be said to be an unrestricted or unregulated discretion.<sup>18</sup>

2. Nor can it be said to be unrestricted where the discretion is to be exercised according to conditions laid down in the Rules made under the statute, which provide adequate safeguards.<sup>19</sup>

3. The entire statute is to be read in order to find out the purpose for which or the standard according to which the power is to be exercised.<sup>16</sup>

#### Illustrations.

(i) S. 3 of the Cotton Textiles (Control of Movement) Order, 1948, made in exercise of the power conferred by s. 3 of the Essential Supplies (Temporary Powers) Act, 1946 provided—

"No person shall transport . . . any cloth . . . except under . . . a general permit notified . . . by the Textile Commissioner".

*Held*, that the power given to the Textile Commissioner was not unfettered because the policy of the Order was evident from the Order and the Act under which it was made, namely, to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country. The grant or refusal of a permit by the Textile Commissioner was to be governed by this policy. Hence, the Order could not be invalidated as constituting an unreasonable restriction upon the fundamental right.<sup>16</sup>

(ii) In the expression 'subversive activities prejudicial to national security' in the Safeguarding of National Security Rules, the words 'subversive activities' are no doubt vague or comprehensive enough to include a variety of activities which are not susceptible of easy definition or ascertainment. But, read in the context of the words 'prejudicial to national security', they would afford an ascertainable standard to the Governor to take action under the Rules.<sup>18</sup>

11. *Ebrahim v. State of Bombay*, (1954) S.C.R. 933 : (1952-4) 2 C.C. 181.

12. *Ganapati v. State of Ajmer*, (1955) 1 S.C.R. 1065 (1069).

13. *Jai Kishan v. I.T.O.*, A. 1959 All. 19 (29).

14. *Dwarka Prasad v. State of U. P.*, (1952-54) C.C. 221 (223) : (1954) S.C.R. 803.

15. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (447) : A. 1956 S.C. 676.

16. *Harishankar v. State of M. P.*, A. 1954 S.C. 465 : (1955) 1 S.C.R. 380.

17. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (901).

18. *Eswareiah v. State of Andhra*, A. 1958 A.P. 288 (292).



**Right to appeal as a condition of reasonableness.**

1. Where discretionary power is vested in an administrative authority, the Courts insist upon certain safeguards in order to uphold the reasonableness of the restrictions imposed upon a fundamental right under Art. 19 by the statute which vests such power. One of these safeguards is the provision for appeal from the decision of the administrative authority to a superior authority. Where such provision has been made by the statute, it cannot be said that the discretion is unfettered.<sup>19</sup>

2. But while in the case of rights such as the right of association<sup>20</sup> or of property<sup>21</sup>, the Supreme Court has insisted upon a judicial supervision, whether by suit or by appeal, in the matter of rights like that of business,<sup>22</sup> the Court has considered the requirement of procedural reasonableness to be satisfied if the statute provides for an administrative appeal to a higher administrative authority or to the Government itself.

3. But where no higher administrative authority is prescribed by the statute, the mere fact that the inferior authority is required to give reasons for his decision, is not sufficient to satisfy the requirement of procedural reasonableness.<sup>23</sup>

**Whether mere retrospectivity would make a restriction unreasonable.**

A restriction which is reasonable does not cease to be so merely because it is given retrospective effect.<sup>24,25</sup>

But the retrospectivity of a statute is an element which may be properly taken into consideration in determining the reasonableness of the restriction imposed by the statute.<sup>26,27</sup>

**Whether restriction includes prohibition.**

1. It is now settled<sup>28</sup> that no inflexible answer to this question is possible and that it is the nature of the business or property which is an important element in determining how far the restriction may reasonably go.

Thus—

(a) in the case of dangerous or noxious trades, such as production or trading in liquors<sup>29</sup> or cultivation of narcotic plants,<sup>30</sup> or trafficking in women,<sup>31</sup> it would be a 'reasonable restriction' to prohibit the occupation, trade or business altogether. Similar view has been taken of business in essential commodities.<sup>32</sup>

19. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 : A. 1956 S.C. 676; *Patel v. Union of India*, (1960) S.C.J. 224 (230).

20. *State of Madras v. Row*, (1952) S.C.R. 597 (607).

21. *Raghbir v. Court of Wards*, (1953) S.C.R. 1049 (1055); *Jagannath v. State of Orissa*, (1954) S.C.R. 1046 (1051); *Sadasiv v. State of Orissa*, A. 1956 S.C. 432.

22. *Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 803 (813).

23. *Sadhu Ram v. Custodian-General*, (1955) 2 S.C.R. 1113 (1116) : A. 1956 S.C. 43.

24. *Srikrishnan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

25. *State of W. B. v. Subodh Gopal*, A. 1954 S.C. 92 (104) : (1954) S.C.R. 587.

1. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (621).

2. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873 : (1952-4) 2 C.C. 227.

3. *Karam Das v. Union of India*, (1956) S.C. [unrep.].

3a. *Narendra v. Union of India*, (1960) S.C.J. 214 (221-2).

On the other hand—

(b) In the case of an ordinary trade or calling, not only an express prohibition but any restriction which has the practical effect of a total stoppage<sup>4</sup> of the business, would be unreasonable.

#### What constitutes a total prohibition.

Whether a restriction, in effect, amounts to a prohibition, is a question of fact, to be determined according to the circumstances of each case,<sup>5</sup> having regard to the ambit of the right<sup>6</sup> and the effect of the restriction upon the exercise of that right.<sup>7</sup>

Thus—

(a) Where the prohibition is only with respect to the exercise of the right in a particular area or relating to particular matters, there is no total prohibition of the right.<sup>8</sup>

#### Illustration.

A notification prohibiting the publication of a matter does not amount to a total prohibition of the freedom of expression of any person if it is limited to the publication of matter (a) relating to a specified topic, (b) within a specified area and (c) for a limited period of time.<sup>9</sup>

(b) On the other hand, if the effect of a restriction is to prevent the Petitioner from exercising his right at all, it amounts to a total prohibition, though it may not be couched in that shape.<sup>7</sup>

#### Illustration.

At Jalalabad, the vegetable growers used to bring their produce to the town and get them auctioned through a dealer of their choice who charged them a commission of one anna in the rupee. The Town Area Committee made certain bye-laws, by which the right to levy and collect commission on sale and purchase of vegetable was vested in the Committee or an agency appointed by the Committee. The Committee then auctioned this right in favour of a contractor B. The Committee by other bye-laws, provided that nobody could sell vegetables in wholesale without payment of a prescribed licence fee to the contractor. *Held*, the bye-laws, in effect, brought about a *total stoppage of the wholesale business* in vegetables, in the commercial sense. For, the wholesale dealers, who will have to pay the prescribed fee to the contractor, will necessarily have to charge the growers of vegetables something over and above the prescribed fee so as to keep a margin of profit for themselves, but in such circumstances, no grower of vegetables will have the produce sold to or auctioned by the wholesale dealers at a higher rate of commission but all of them will flock to the contractor who will only charge them the prescribed commission. Hence, the bye-laws imposed 'unreasonable' restrictions and were void.<sup>7</sup>

#### Reasonableness of taxing laws.

1. Taxation is an independent power of the State, and there is no fundamental right to be immune from taxation.<sup>9</sup> Hence, the exercise

4. *Rashid Ahmed v. Municipal Board*, (1950-51) C.C. 61 : (1950) S.C.R. 566.

5. *Cf. Krishna Kumar v. Municipal Committee*, (1957) S.C. [unrep.].

6. *Virendra v. State of Punjab*, A. 1957 S.C. 896 (899).

7. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

8. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587.



of none of the fundamental rights guaranteed by Art. 19 (1) can claim absolute immunity from taxation and no taxing law can be held to be unreasonable merely because it affects or imposes a burden on the exercise of a fundamental right guaranteed by Art. 19(1),<sup>9,10</sup> or merely because it is retrospective.<sup>11,12</sup>

2. If, however, a tax is imposed not for the purpose of raising revenue, but with the deliberate object of destroying a fundamental right, it might be held to impose an 'unreasonable restriction' on the exercise of that right.<sup>13</sup> It follows, therefore, that a distinction should be made between a tax imposed for purposes of revenue and a tax levied for the purpose of regulation. At any rate, a law which authorises the imposition of a license-fee without any limit as to its quantum must be held to constitute an unreasonable restriction upon the right guaranteed by Art. 19 (1) (g).<sup>14</sup>

3. When a tax operates upon a fundamental right guaranteed by Art. 19 (1) but is imposed without authority of law,<sup>15</sup> or is *ultra vires* owing to contravention of some mandatory provision of the Constitution (e.g., Art. 286), the Courts may annul the tax as an 'unreasonable restriction'.<sup>16,16</sup>

#### 'In the interests of'.

1. This expression occurs in all the cls. (2)-(6).

2. The expression is of a wide connotation, and is wider than words like 'for the maintenance of'. 'In the interests of' authorises the Legislature to restrict an act or utterance which not only produces the mischief aimed at, e.g., breach of public order or security of the State, but also those which have a *tendency* to cause that effect,<sup>17</sup> but which may not actually lead to a breach of public order. Thus, the excitement of religious disaffection with a deliberate intent has a proximate tendency to cause public disorder; hence, s. 295A of the I.P.C. must be held to be a reasonable restriction 'in the interests of public order'.<sup>18</sup>

3. On the other hand, the expression postulates a proximity of relationship.<sup>19</sup>

Thus, a limitation imposed in the interest of public order to be a reasonable restriction, should be one which had a proximate or reasonable connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.<sup>20</sup>

#### 'Interests of the general public'.

This expression occurs in both cls. (5) and (6) of Art. 19.

1. The words 'general public' refer to the *rest* of the citizens, with reference to a free citizen who claims the right in question. It does

9. *Ananthakrishnan v. State of Madras*, A. 1952 Mad. 305 (404-5); *Ramesh v. State of Assam*, A. 1956 Assam 177 (184).

10. Cf. *Srinivasamurthy v. State of Mysore*, A. 1950 S.C. 894 (896).

11. *Chhotabhai v. Union of India*, A. 1952 Nag. 139.

12. *Pithaparam v. State*, A. 1958 A.P. 558 (563).

13. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (578) : A. 1952 S.C. 115.

14. *Liberty Cinema v. Calcutta Corpn.*, A. 1950 Cal. 45 (53).

15. *State of Bombay v. United Motors* (1953) S.C.R. 1069 (1077) : A. 1953 S.C. 252.

16. *Himmattal v. State of M. P.*, (1954) S.C.R. 1122 : (1952-54) 2 C.C. 242 : A. 1954 S.C. 403.

17. *Ramji Lal v. State of U.P.*, A. 1957 S.C. 620.

18. *Supdt. v. Ram Manohar*, (1950) S.C. [unreported], affirming *Ram Manohar v. Supdt.*, A. 1955 All. 193.

not refer to any group or class of people as distinguished from the people generally. That is the very reason why specific mention of the interests of any 'Scheduled Tribe' has been necessary in cl. (5).<sup>19</sup>

2. This does not mean, however, that a legislation may be in the interests of the general public only if it is 'in the interests of the public of the whole of the Republic of India'.<sup>20</sup> Legislation may be essential to redress some urgent grievance in a particular State, though such legislation would be wholly unnecessary in any other State. The fact that such legislation would not affect citizens of other States would not make it impossible to say that it was in the interests of the general public. The phrase 'in the interests of the general public', in short, means nothing more than 'in the public interest'. It may well be that legislation affecting a limited class of *persons* or a limited *area* is in the public interest, though the public of other parts of India may not be directly affected by such legislation. Legislation affecting a particular class or a particular area would only directly affect the members of that class or the inhabitants of the area. But the removal of some serious abuse or grievance or discontent is a matter indirectly affecting the public generally.<sup>21</sup> A legislation may be 'in the interests of the general public' even though it affects the interests of particular individuals.<sup>2</sup>

Thus, the following are restrictions imposed in the interests of the general public—

- (a) Prevention of wasteful expenditure by landlords<sup>22</sup>;
- (b) Regulation of hours or days of work in shops and commercial establishments<sup>23,24</sup>;
- (c) Protection of tenants against excessive rent and unreasonable eviction<sup>25,1</sup>;
- (d) Protection of the debtors from excessive interest<sup>2</sup>;
- (e) Limiting the number of rickshaws plying within the limits of a municipal corporation<sup>2</sup>;
- (f) Externment of dangerous persons from a particular locality.<sup>2</sup>

3. This expression, in cls. (5) and (6) of Art. 19, authorises the State to impose restriction not only on the ground of public order but also on grounds of social and economic policy<sup>2</sup> or on the ground of the common good, e.g., securing the objects mentioned in Part IV of the Constitution (Directive Principles).<sup>4</sup>

4. Though the Court respects the determination of the Legislature as to what is good for the community, by whose suffrage it came into existence, that determination is not final since the Constitution

19. Cf. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (182), Kania C.J. : (1950) S.C.R. 88.

20. *Iswari Prasad v. N. R. Sen*, A. 1952 Cal. 273 (278).

21. *Sampuran v. Competent Officer*, A. 1955 Pepsu 148; *Jamnalal v. Kishendas*, A. 1955 Hyd. 194; *Nambodripad v. C. D. Board*, A. 1956 T.C. 19 (F.B.).

22. *Kuldip v. Punjab State*, A. 1954 Punj. 247.

23. *Matrumal v. Chief Inspector*, A. 1952 All. 773.

24. *Jugal v. Labour Commrs.*, A. 1958 Pat. 442 (444).

25. *Ramnath v. Sukumari*, A. 1954 Pat. 211.

1. *Bhagirath v. State of Punjab*, A. 1954 Punj. 167 F.B.

2. *Raghbir v. Union of India*, A. 1954 Punj. 261.

3. *Satyaranjan v. Commr. of Police*, A. 1955 Cal. 417.

4. *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 : A. 1952 S.C. 221.

5. *Narendra v. Union of India*, (1960) S.C.J. 214 (221); *B. C. Mills v. State of Ajmer*, (1955) 1 S.C.R. 752.

6. *Krishnamurthy v. Venkateswaran*, A. 1952 Mad. 11.



vests in the Court the ultimate responsibility for determining whether a restriction upon a fundamental right is in the interests of the public and the Court must not shirk this solemn duty cast on it by the Constitution.<sup>4</sup>

**Cl. (1) (a): Freedom of Speech and Expression.**

This freedom means the right to express one's convictions and opinions freely, by word of mouth, writing, printing, picture or in any other manner (addressed to the eyes or the ears). It would thus include not only the freedom of Press, but the expression of one's ideas by any visible representation, such as by gestures and the like. Expression, naturally, presupposes a second party to whom the ideas are expressed or communicated. In short, freedom of expression includes the freedom of propagation of ideas, their publication and circulation.<sup>5</sup>

**Freedom of the Press.**

1. Under *our* Constitution, there is no separate guarantee of freedom of the Press. It is implicit in the freedom of expression which is conferred on all citizens.<sup>6,16</sup>

2. It follows that this freedom cannot be claimed by a newspaper or other publication run by a non-citizen.<sup>7</sup>

3. The freedom of Press, under *our* Constitution, is not higher than the freedom of an ordinary citizen.<sup>8</sup> It is subject to the same limitations as are imposed by Art. 19 (2).

4. The Press is not, accordingly, immune from—

(a) the ordinary forms of taxation;<sup>9</sup>

(b) the application of the general laws relating to industrial relations;<sup>11</sup>

(c) the regulation of the conditions of service of the employees.<sup>10</sup>

5. But, in view of the guarantee of freedom of expression, it would not be legitimate for the State—

(a) to subject the Press to laws which take away or abridge the freedom of expression or which would curtail circulation and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid;<sup>12</sup>

(b) to single out the Press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media;<sup>10</sup>

(c) to impose a specific tax upon the Press deliberately calculated to limit the circulation of information.<sup>13</sup>

**Cl. (2): Grounds of restriction of the freedom of speech and expression.**

1. Any restriction imposed upon the above freedom is *prima facie* unconstitutional, unless it can be justified under the limitation clause, i.e., clause (2). This clause authorises the State to impose restrictions upon the freedom of speech only on certain specified grounds so that if, in any particular case, the restrictive law cannot rationally<sup>14</sup> be shown to relate to any of these specified grounds, the law must be held to be void.<sup>5</sup>

7. *Quareshi v. State of Bihar*, A. 1958 S.C. 731 (744).

8. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594 : (1950-51) C.C. 40 (41); A. 1950 S.C. 124.

9. *Sharma v. Srikrishna*, A. 1959 S.C. 395 (402).

10. *Express Newspaper v. Union of India*, A. 1958 S.C. 578 (614).

11. *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276.

2. Cl. (2), as amended by the **Constitution (First) Amendment Act**, enables the Legislature to impose restrictions upon the freedom of speech and expression, on the following grounds—

- (i) Security of the State.
- (ii) Friendly relations with foreign States.
- (iii) Public order.
- (iv) Decency or morality.
- (v) Contempt of Court.
- (vi) Defamation.
- (vii) Incitement to an offence.

(i) **'Security of State'**.—Security of the State means 'the absence of *serious and aggravated forms* of public disorder', as distinguished from ordinary breaches of 'public safety' or 'public order' which do not involve any danger to the State itself. Thus, security of the State is endangered by crimes of violence intended to overthrow the government, levying of war and rebellion against the government, external aggression or war, but not by minor breaches of public order or tranquillity, such as unlawful assembly, riot, affray, rash driving, promoting enmity between classes and the like.<sup>12</sup> But incitement of violent crimes like murder, which is an offence against 'public order', may also undermine the security of the State.<sup>13</sup>

The advocacy of revolutionary socialism as a panacea for present-day evils cannot be restricted under the present ground, unless the use of violence is suggested.<sup>14</sup>

(ii) **'Friendly relations with foreign States'**.—The object of this exception to the freedom of speech and expression is to prevent libels against foreign States in the interests of maintaining friendly relations with them.

It is to be noted, however, that members of the Commonwealth of Nations, including Pakistan, are not 'foreign States' for the purposes of this Constitution, according to the Declaration of Foreign States Order, 1950. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

(iii) **'Public Order'**.—1. This ground has been introduced by the **Constitution (First) Amendment Act, 1951**, in order to meet the situation arising from the Supreme Court decision in *Ramesh Thappar's case*<sup>15</sup> that ordinary or local breaches of public order were no grounds for restricting the freedom of speech guaranteed by the Constitution.

Following this decision,<sup>16</sup> it was held in some cases<sup>17</sup> that incitement to individual murder or promoting disaffecting amongst classes did not tend to undermine the security of the State and was not, accordingly, punishable under the Constitution.

It was to override the above judicial decisions<sup>18</sup> that the ground 'public order' was inserted by the Constitution (First Amendment) Act.

After this amendment, the Supreme Court itself has, in *State of Bihar v. Shailabala*,<sup>19</sup> explained their decision in *Ramesh Thappar's case*,<sup>15</sup> saying that it was never meant in *Ramesh Thappar's case* that individual crimes of violence like murder would not undermine the 'security of the State'.

2. As to the meaning of 'public order', generally, see under Entry 1 of Sch. VII, *post*.

12. *Ramesh Thappar v. State of Madras*, (1950-51) C.C. 40 : (1950) S.C.R. 594.

13. *Tara Singh v. The State*, A. 1951 Panj. 27; in *Re Bharati Press*, A. 1951 Pat. 12 (S.B.); *Srinivasa v. Madras*, A. 1951 Mad. 70 (S.B.).

14. *State of Bihar v. Shailabala*, (1952) S.C.R. 654 (658).



Though the scope of the several grounds specified in cl. (2) may sometimes overlap, they must ordinarily be intended to exclude each other. So, interpreted, 'public order', in the present context, is synonymous with 'public peace, safety and tranquillity'.<sup>14</sup>

3. It follows that—

(A) In the interests of public order, the State may impose restrictions on—

(a) The incitement of—

(i) Withholding of services by public employees or by persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community.<sup>15</sup>

(ii) Committing breach of discipline amongst employees of the class referred to above.<sup>16</sup>

(iii) Feelings of enmity or hatred between different sections of the community.<sup>14, 17</sup>

(b) The use of loudspeakers likely to cause a public nuisance,<sup>18</sup> or to affect the health of the inmates of residential premises, hospitals and the like.<sup>19</sup>

(B) On the other hand, the following cannot be restricted or penalised in the interests of 'public order'—

Advocacy of non-payment of Government dues without resorting to violence.<sup>14</sup>

(iv) '**Decency or Morality**'.—This exception has been engrafted for the purpose of restricting speeches and publications which tend to undermine public morals.

The question whether an utterance is likely to undermine decency or morality is to be determined with reference to the probable effects it may have upon the audience to which it is addressed. The age, culture,<sup>14</sup> and the like of the audience thus becomes a material question.

But the use of mere abusive language, which has no suggestion of obscenity to the persons in whose presence they are uttered, would not come under the present ground.<sup>20</sup>

(v) '**Contempt of Court**'.—In the exercise of his right of freedom of speech and expression, nobody can be allowed to interfere with the due course of justice or to lower the prestige of authority of the Court.<sup>20a</sup>

(vi) '**Defamation**'.—Just as every individual possesses the freedom of speech and expression, every person also possesses a right to his reputation which is regarded as property. Hence, nobody can so use his freedom of speech or expression as to injure another's reputation. Laws penalising defamation do not, therefore, constitute infringements of the freedom of speech.<sup>20a</sup>

(vii) '**Incitement to an offence**'.—The reasons that led to the insertion of this ground of restriction have already been explained (p. 84, ante). But the ground as stated, will permit legislation not only to punish or prevent incitement to commit serious offences like murder which lead to breach of public order, but also to commit any 'offence',

14. *Supdt. v. Ram Manohar*, (1960) S.C. [Cr. A. 76/56; unreported].

15. *State v. Ramanand*, A. 1956 Pat. 188 (195).

16. *Tilok v. State*, A. 1954 Ajmer 19.

17. *Virendra v. State of Punjab*, A. 1958 S.C. 986.

18. *Rajani v. State*, A. 1958 All. 360.

19. *State of Rajasthan v. Charola*, (1959) 1 M.L.J. 5n. (S.C.).

20. *Kartar Singh v. State of Punjab*, A. 1956 S.C. 541.

20a. See C. 3, Vol. II, pp. 184-7; *Ibid.*, pp. 187-8.

which, according to the General Clauses Act, means 'any act or omission made punishable by any law for the time being in force'. Hence, it is not permissible to instigate, another to do any act which is prohibited and penalised by any law.<sup>21</sup> Mere instigation not to pay a tax may not necessarily constitute 'incitement to an offence'.<sup>22</sup>

'In the interests of'.—See p. 81, *ante*.

### Restrictions in the interests of public order.

A. In the interests of public order, the State may impose restrictions on—

(a) The incitement of—

(i) Withholding of services by public employees or by persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community.<sup>23</sup>

(ii) Committing breach of discipline amongst employees of the class referred to above.<sup>23</sup>

(iii) Feelings of enmity or hatred between different sections of the community.<sup>24,25</sup>

(b) Insulting the religious feelings of any class of citizens, with a deliberate and malicious intention (s. 295A, I.P.C.; s. 99A, Cr. P. C.).<sup>26</sup>

(c) The use of loudspeakers likely to cause a public nuisance,<sup>1</sup> or to affect the health of the inmates of residential premises, hospitals and the like.<sup>2</sup>

B. On the other hand, restrictions cannot be imposed, 'in the interests of public order', on utterances of the following kinds—

(i) Criticism of a party government.<sup>3</sup>

(ii) Criticism<sup>4</sup> of, or defamatory slogan<sup>5</sup> against, a Minister.

(iii) Instigation of persons not to pay a tax or other imposition, not involving 'incitement to an offence'.<sup>22</sup>

(iv) Scurrilous attacks upon a Judge.<sup>6</sup>

### Mere disaffection cannot be penalised under the Constitution.

1. Criticism of a party Government is no ground for restricting freedom of speech and expression, unless it undermines the security of the State or public order or incites the commission of any offence. 'Sedition', i.e., merely exciting 'disaffection or bad feelings towards the Government' is, therefore, no ground for restricting the freedom of speech and expression, under Art. 19 (2).<sup>7</sup>

2. S. 124A of the Indian Penal Code (Sedition) in so far as it penalises mere incitement of 'hatred, contempt or disaffection' towards the Government is, therefore, unconstitutional, being in contravention

21. *Ibid.*, pp. 188-9.

22. *Supdt. v. Ram Manohar*, (1960) S.C. [Cr. A. 76/56; *unreported*].

23. *State v. Ramanand*, A. 1956 Pat. 188 (193).

24. *Tilok v. State*, A. 1954 Ajmer 19.

25. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620 : (1957) S.C.R. 860.

1. *Rajani v. State*, A. 1958 All. 360.

2. *State of Rajasthan v. Charola*, (1959) 1 M.L.J. 5n. (S.C.).

3. *Ahmad v. State*, A. 1951 All. 459.

4. *Ram Nandan v. State*, A. 1959 All. 101 (110).

5. *Cf. Kartar Singh v. State of Punjab*, A. 1956 S.C. 541.

6. *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276.

7. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594 (602) : A. 1950 S.C. 124.



of Art. 19 (1)(a).<sup>8</sup> This pronouncement has not been affected by the Constitution (First Amendment) Act, 1951.<sup>9</sup>

A contrary view has been expressed by the Patna High Court,<sup>10</sup> viz., that the expression 'in the interests of' in cl. (2) of Art. 19 gives a wider connotation to the grounds of restriction mentioned therein. In other words, the 'interests of public order' would be seriously affected by creating disaffection, hatred or contempt towards the Government, even though there may be no tendency or incitement to violence. The Court agrees, however, that 'mere criticism or disapprobation of Government measures' would not be covered by 'in the interests of public order'.

It is debatable whether the expression 'in the interests of' is sufficient to widen the scope of the meaning attributed by the Supreme Court in *Ramesh Thappar's case*<sup>11</sup> to the expression 'public order'. Of course, as the Supreme Court has subsequently observed,<sup>12</sup> the expression 'in the interests of' is wider than the expression 'for the maintenance of' and that a law might, therefore, after the amendment, validly impose restrictions on utterances which have a tendency to cause public disorder but which may not actually lead to a breach of public order.

Nevertheless, the question to be determined in each case is whether the mischief to be averted has a proximate or only a remote connection with the ground of restriction authorised by the Constitution. The question whether there is any such proximate relation between creating a hatred towards the government in power and a tendency to cause public disorder, therefore, awaits a final decision of the Supreme Court. But the view of the Author, expressed at p. 68 of the 2nd Ed., that the relationship of the mischief must be proximate to the constitutionally permissible ground of restriction in order to make the restriction 'reasonable' within the meaning of cl. (2) of Art. 19, now finds support from the Supreme Court decision in *Supdt. v. Ram Manohar* (see p. 81, ante).

### Criticism of a Minister or other high dignitaries.

As stated earlier (p. 86, ante) the criticism or even vulgar abuse of a Minister<sup>13</sup> or scurrilous attacks upon a Judge<sup>14</sup> cannot be punished 'in the interests of the security of the State';<sup>14</sup> nor even of 'public order,'<sup>14</sup> unless there is a reasonable apprehension of breach of the peace to such an extent that it may be said that there is a rational connection between the utterances and the maintenance of public order.<sup>14</sup> The mere fact that a section of the public is 'annoyed' by reason of the utterances is not enough. The remedy in such cases is an action for defamation brought by the dignitary, under the ordinary law.<sup>15</sup>

### The right to 'picket'.

1. Logically, freedom of speech and expression includes the right to give vent to one's grievances in a lawful manner or to persuade another to do an act which is not unlawful. Picketing, which means an endeavour to dissuade persons from remaining at work by use of

8. *Tara Singh v. The State*, A. 1951 Panj. 27. [See, further, C3, Vol. I, pp. 200-1].

9. *Sadat Jahan v. State of Hyderabad*, A. 1953 Hyd. 295; *Sarju v. State*, A. 1956 All. 589; *Ram Manohar v. Supdt.*, A. 1955 All. 193; *Srinivas v. State of Madras*, (1955) 1 M.L.J. 115; *Ram Nandan v. State*, A. 1959 All. 101 (F.B.).

10. *Debi Soren v. State*, A. 1954 Pat. 254.

11. *State v. Ramanand*, A. 1956 Pat. 188 (192-3).

12. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620 : (1957) S.C.R. 860.

13. *Karlar Singh v. State of Punjab*, A. 1956 S.C. 541.

14. *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276.

'pickets' or strikers posted on guard outside the place of employment for the purpose of dissuading the non-strikers from continuing at work, is thus a mode of exercise of the freedom of expression of the strikers.

2. But even when picketing is not itself attended with violence, picketing may be restricted under our Constitution on the ground that, if allowed, it would tend to a breach of the 'public order' by engendering a conflict between the picketers and the persons subjected to 'picketing'.<sup>15</sup> The right to picket is also subject to the corresponding right of the persons who are subjected to picketing, to carry on their trade or profession without let or hindrance.<sup>15,16</sup>

### Reasonableness of restrictions.

#### (A) Substantive aspect.

#### Instances of unreasonable restrictions.

1. If the essence of the freedom of expression means freedom from previous restraint, it follows that pre-censorship of any written publication is, *prima facie*, an unreasonable restriction on the freedom guaranteed by Art. 19 (1) (a).<sup>17,18</sup>

2. But whether it would be unreasonable in given circumstances would have to be determined by applying the various tests of urgency, duration, nature of the publications affected, and the like. Thus—

(a) The validity of s. 144 of the Criminal Procedure Code which empowers the District Magistrate to impose a pre-censorship on newspapers, has been upheld on the ground that the restriction imposed by it was reasonable in view of the fact that it could be imposed only in emergent circumstances and for a temporary period.<sup>19</sup>

(b) (i) S. 3 (1) of the Punjab Special Powers (Press) Act, 1956 provides—

"The State Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may, by notification, prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication."

The Supreme Court invalidated<sup>20</sup> the above provision on the ground that it was unreasonable both from the substantive and procedural points of view. It was held that it was substantively objectionable because no limitation was imposed either as to the *duration* of the ban on importation authorised by the provision nor as to the *subject-matter* of the publication. It extended to any publication, and might be of an indefinite or unlimited duration. Procedurally, again, it placed the whole matter at the subjective determination of the State Government and there was no provision even for any representation of the party affected. It thus offended against the rules of natural justice.

(ii) At the same time, the Court upheld the validity of another section<sup>21</sup> of the same Act which was *not* lacking in the above respects. This was Section 2(1)(a), which ran as follows:

"2(1) The State Government or any authority so authorised in this behalf if satisfied that such action is necessary for the purpose of pre-

15. Cf. *In re Vengan*, A. 1952 Mad. 95.

16. *Damodar v. State*, A. 1951 Bom. 459 (464).

17. *Ramkrishnalah v. Dt. Board*, (1952) 1 M.L.J. 38.

18. *State v. Baboo Lal*, A. 1956 All. 571 (573).

19. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594; A. 1950 S.C. 124.

20. *In re Bandi*, A. 1952 Mad. 61.

21. *Virendra v. State of Punjab*, A. 1958 S.C. 986.



venting or combating any activity prejudicial is the *maintenance of communal harmony affect or likely to affect public order*, may, by order in writing address to a printer, publisher or editor,

"(a) prohibit the printing or publication in any document or any classes of documents of any matter relating to a *particular subject* or classes of subjects for a *specified period* or in a particular issue or issues of a newspaper or periodical;

"Provided that no such order shall remain in force for more than *two months* from the making thereof;

"Provided further that the person against whom the order has been made may within ten days of the passing of this order makes a *representation* to the State Government which may on consideration thereof modify, confirm or rescind the order. . . ."

In short,—

To prevent a breach of the peace during a period of emergency (such as communal agitation), *temporary* restrictions may also be imposed upon the publication of a *specified* class of matter in newspaper provided the rules of natural justice are complied with.<sup>21</sup>

3. S. 3(d) of the Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954 provides—

" . . . no person shall take part in any publication of any advertisement referring to any drug which suggest . . . the use of that drug for—

the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or *any other disease or condition which may be specified in rules made under this Act*".

The rule-making power under the Act was given to the Central Government. *Held*, that the italicised portion conferred uncanalised and uncontrolled power to the Executive to include, by specifying it in the Rules, any disease within the mischief of the Act, and thus imposed an unreasonable restriction upon the freedom of expression.<sup>22</sup>

4. S. 8 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, which was enacted "to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities" and to provide for matters connected therewith", provided—

"Any person authorised by the State Government . . . may seize and detain any document, article or thing which such person has reason to believe contains an advertisement which contravenes any of the provisions of this Act. . . ."

*Held*, that the above provision went far beyond the purposes of the Act and, in the absence of adequate safeguards, constituted an unreasonable restriction on the freedom of expression guaranteed by Art. 19 (1) (a).<sup>23</sup>

#### Instances of reasonable restrictions.

Dramatic performances, cinematographic exhibition and the like stand on a different footing inasmuch as there is a difference between a written word and a spoken word and other representations which react immediately and more violently on the minds of the audience.<sup>24</sup> Pre-censorship of such representation is not, therefore, *per se* invalid but may be so if it violates the condition of procedural reasonableness.

22. *Hamdard Dawkhana*, (1960) 1 S.C.A. 314.

23. *State v. Baboo Lal*, A. 1956 All. 57 (574).

(B) *Procedural aspect.***Instances of unreasonable restrictions.**

1. S. 10 of the Dramatic Performances Act, 1876, which empowers an executive officer to restrict a dramatic performance on his subjective satisfaction and without giving an opportunity to be heard to the persons going to be affected by the order, constitutes an unreasonable restriction upon the freedom of expression.<sup>24</sup>

2. S. 3 (1) of the Punjab Special Powers (Press) Act, 1956 which empowered the State Government to prohibit the bringing into the State any newspaper, if the Government was *satisfied* that such action was necessary for the maintenance of communal harmony or public order, has been held to be invalid on the ground that it placed the whole matter at the subjective satisfaction of the State Government without even providing for a right of representation to the party affected.<sup>25</sup> (See p. 88, *ante*).

**Arts. 19 (1) (a); 105 (3); 194 (3): Freedom of Speech and Parliamentary privilege.**—See under Art. 105, *post*.

**Arts 19 (1) (a) and 343.**

The subject of official languages having been dealt with in the specific art. 343, must be deemed to be outside the purview of Art. 19 (1) (a).<sup>1</sup>

**Constitutionality of some Acts with reference to Art. 19 (1) (a).****Bombay Industrial Relations Act, 1946:**

*Held valid.*—Ss. 12-13.<sup>2</sup>

**Criminal Procedure Code, 1898:**

*Held valid.*—S. 99A;<sup>3</sup> s. 144.<sup>4</sup>

**Dramatic Performances Act, 1876:**

*Held invalid.*—S. 10.<sup>24</sup>

**Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954:**

*Held invalid.*—Ss. 3(d);<sup>5</sup> 8.<sup>2</sup>

**East Punjab Public Safety Act :**

*Held invalid.*—S. 7(1)(c).<sup>6</sup>

**Industrial Disputes (Appellate Tribunal) Act, 1950:**

*Held valid.*—S. 27.<sup>2</sup>

**Madras City Police Act, 1888:**

*Held valid.*—S. 41.<sup>7</sup>

24. *State v. Baboo Lal*, A. 1956 All. 571 (574).

25. *Virendra v. State of Punjab*, A. 1958 S.C. 986.

1. *Wakhare v. State*, A. 1959 M.P. 208.

2. *Kulkarni v. State of Bombay*, (1954) S.C.R. 384.

3. *Veerabrahman v. State*, A. 1959 A.P. 572.

4. *Deshpande v. City Magistrate*, A. 1953 All. 577.

5. *Hamdard Dvakhana*, (1960) I S.C.A. 314.

6. *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594.

7. *Annadurai*, in re, A. 1959 Mad. 63.



**Penal Code, 1860:**

*Held valid.*—Ss. 295A.<sup>8</sup>

**Police (Incitement to Disaffection) Act, 1922:**

*Held valid.*—S. 3.<sup>9</sup>

**Punjab Special Powers (Press) Act, 1956:**

*Held valid.*—S. 2 (1) (a),<sup>9</sup> (b).<sup>9</sup>

*Held invalid.*—S. 3.<sup>9</sup>

**Representation of the People Act, 1951:**

*Held valid.*—Ss. 123 (5),<sup>10</sup> 125 (5).<sup>10</sup>

**U. P. Special Powers Act, 1932.**

*Held void.*—S. 3.<sup>11</sup>

**Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955:**

*Held valid.*—Whole Act.<sup>12</sup>

**Cl. (1) (b): Freedom of Assembly.**

This clause guarantees the freedom of citizens to meet with each other in any number provided the assembly is (a) peaceable and (b) unarmed. Like other rights, this also is not an absolute right but is liable to be subjected to 'reasonable' restrictions in the interests of public order. The right of public meeting or of procession is not specifically guaranteed by the Constitution but will follow from the right of assembly.

'Public Order'.—See pp. 84-5, *ante*.

**Constitutionality of some Central Acts with reference to Art. 19**

**(1) (b):**

**Criminal Procedure Code, 1898:**

*Held valid.*—S. 144.<sup>13a</sup>

**Madras City Police Act, 1888:**

*Held valid.*—S. 41.<sup>14</sup>

**Cl. (1) (c): Freedom of Association.**

1. The right guaranteed by this clause is the ordinary right which is enjoyed by all citizens to form associations; it has no reference to a right which is conferred by a particular statute to act as a member of a body which is the creation of the statute itself.<sup>14, 15</sup> Thus—

It cannot be said that the supersession of a District Board under s. 131 of the Bengal Local Self-Government Act operates as a restriction upon the rights of the members of the Board under Art. 19(1) (c).<sup>14</sup>

8. *Ramji Lal v. State of U. P.*, (1957) S.C.R. 860 (867) : A. 1957 S.C. 620.

8a. *Indulal v. Ambrish*, (1959) 62 Bom. L.R. 208 (214).

9. *Virendra v. State of Punjab*, (1958) S.C.R. 308 (327).

10. *Jamuna Prasad v. Lachhi Ram*, (1955) 1 S.C.R. 608.

11. *Supdt. v. Ram Manohar*, (1960) S. C. [unrep.], affirming *Ram Manohar v. Supdt.*, A. 1955 All. 193.

12. *Express Newspapers v. Union of India*, A. 1958 S.C. 578.

12a. *Raj Narain v. Dt. Magistrate*, A. 1956 All. 481.

13. *Annadurai*, in re, A. 1959 Mad. 62 (67).

14. *Bidhu v. State of W. B.*, A. 1952 Cal. 901.

15. *Kulkarni v. State of Bombay*, (1952-54) C.C. 176 : A. 1954 S.C. 73, affirming A. 1951 Bom. 106.

2. The word 'form' includes not only the right to start an association but also to continue it,<sup>16</sup> or to refuse to be a member of an association, if he so desires.<sup>17,18</sup>

3. The right to form associations includes associations for any law purpose,<sup>19</sup> e.g., a trade union.<sup>19</sup> The imposition of restrictions upon the lawful purposes or functioning of an association, therefore, constitutes a restriction upon the fundamental right itself,<sup>19</sup> e.g., a restriction upon the right of collective bargaining of a trade union.<sup>19</sup>

4. On the other hand—

No question of infringement of the fundamental right of association arises where the services of a government servant are terminated on the ground that he is a member of the Communist Party, because the order of termination does not prevent him from remaining a member of the Communist Party, but terminates his service which is held at the pleasure of the government and to which he has no fundamental right.<sup>20</sup>

### Reasonableness of Restrictions upon the Freedom of Association.

#### (A) Substantive aspect.

#### Instances of reasonable restrictions.

(i) The Bombay Industrial Relations Act, 1945, provides that in order to be registered as a "representative Union" so as to be entitled to represent with the employers, a Union must have a minimum membership of 15% of the total number of employees employed in any industry in any local area. This provision was challenged on the ground that it infringed the provisions of sub-clause (c) of Art. 19 (1). *Held*, there was no infringement of Art. 19 (1) (c) for no restriction was imposed upon the freedom of the workers to form any Union. The only provision was that in order to represent the interests of the entire body of the workers in any industry, a Union must enlist a prescribed minimum of membership. It was open to any union of workers to enlist the prescribed percentage of membership and claim the privilege. The constitutional right to form a trade union does not carry with it any right of every individual union to represent its members in an industrial dispute and that any conciliatory law which provides for representation of labour by 'representative' unions, e.g., by providing that only those unions which represent not less than 15% of the workers in an industry would be recognized for the purpose of representing the workers of that industry in an industrial dispute does not constitute a 'restriction' upon the freedom of association.<sup>21</sup>

#### Instances of unreasonable restrictions.

1. There cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of an administrative censorship.<sup>22</sup>

Thus, it is an unreasonable restriction to compel employees to obtain permission of the authorities before forming unions and to prohibit them

16. *Kulkarni v. State of Bombay*, A. 1951 Bom. 106; *Row v. State of Madras*, A. 1951 Mad. 147 (F.B.); *U. P. Shramik Sangh v. State of U. P.*, A. 1960 All. 45 (49).

17. *Sitharamachary v. Senior Dy. Inspector*, A. 1958 A.P. 78.

18. There is an obiter in *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676 (709) that the negative right may not be a fundamental right.

19. *U. P. Shramik Sangh v. State of U. P.*, A. 1960 All. 45 (49).

20. *Balakotiah v. Union of India*, A. 1958 S.C. 232.

21. *Kulkarni v. State of Bombay*, (1954) S.C.R. 384 : A. 1954 S.C. 73.

22. *Ramakrishnaiah v. Dt. Board*, A. 1952 Mad. 253.



from becoming members of union not constituted in accordance with the orders of Government. In this case, it was observed that even though Government as employer might choose to recognise one association only as representative of a particular class of employee, it could not prevent the employees from becoming members of other associations which were lawful nor make the previous permission of Government a condition precedent for the exercise of the employees' right to become a member of an association.<sup>23</sup>

2. It follows that Government cannot make it obligatory for every employee to become a member of an association sponsored by the Government.<sup>24</sup>

### (B) *Procedural aspect.*

The fundamental right to form association or unions guaranteed by Art. 19 (1) (c) has such a wide and varied scope for its exercise and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of the authority in the executive Government to impose restrictions on such right without allowing the grounds of such imposition, both in their *factual* and *legal* aspects, to be duly tested in a *judicial* inquiry, is a strong element which should be taken into account in judging the reasonableness of restrictions imposed on the fundamental right under Art. 19 (1) (c).<sup>25</sup>

### Instances of unreasonable restrictions.

S. 15 (2) (b) of the Indian Criminal Law Amendment Act (XIV of 1908) as amended by Madras Act XI of 1950 authorised the State Government to declare any association on its *subjective* satisfaction that such association constitutes a danger to the public peace etc., by issuing a notification published in the Official Gazette. There was no provision for service of the notice upon the members of the association which was the subject-matter of the notification nor was any opportunity to be given to them for showing cause against the declaration. There was a provision for reference by the Government to an Advisory Board of any representation that might be made by any such association, but there was no provision for appearance of the aggrieved persons before the Board and no obligation on the part of the Government to suspend the penal consequence of the declaration pending consideration of the representation by the Board.

The Supreme Court held the provision has an unreasonable restriction upon the right conferred by Art. 19 (1) (c) on the grounds: (i) The imposition of penal consequences after declaring an association as unlawful on the subjective satisfaction of the Government without providing for adequate communication of such declaration to the association and its members, must be regarded as an unreasonable restriction, in the absence of any emergent conditions justifying such a course. (ii) Nor can the summary and one-sided review by an Advisory Board be regarded as a reasonable substitute for judicial inquiry to override the basic freedom of association in the absence of exceptional circumstances.<sup>26</sup>

### Constitutionality of some Acts with reference to Art. 19 (1) (c): Bombay Industrial Relations Act, 1946:

*Held valid.*—S. 13.<sup>27</sup>

23. *Sitharamachary v. Senior Dy. Inspector*, A. 1958 A.P. 78.

24. *State of Madras v. Row*, (1952) S.C.R. 597 (607): A. 1952 S.C. 196.

25. *Kulkarni v. State of Bombay*, (1954) S.C.R. 384.

**Criminal Law Amendment Act, 1908:**

*Held invalid.*—S. 15 (2) (b), as amended by Madras Amendment Act, 1950.<sup>1</sup>

**U. P. Sugarcane (Regulation of Supply & Purchase) Act, 1953:**

*Held valid.*—Ss. 15;<sup>2</sup> 16.<sup>2</sup>

**Right of association of Government servants.**—See under Art. 309, *post*.

**Cl. (1) (d): Freedom of Movement.**

It is the words '*throughout the territory of India*' which explain the meaning of the words 'freedom of movement' in sub-cl. (d) of Art. 19 (1). It does not refer to 'personal liberty' which is dealt with separately, in Art. 21. The free movement guaranteed by the present sub-cl. relates not to general rights of locomotion, but to the particular right of shifting or moving from *one part of Indian territory to another*, without any sort of discriminatory barriers *between one State and another, or between different parts of the same State*. If restrictions are sought to be put upon movement of a citizen from State to State or even within a State, such restrictions will have to be tested by the permissive limits prescribed in cl. (6) of Art. 19. What is sought to be protected by sub-cl. (d) of Art. 19 (1) is only a specific and limited aspect of the right of free movement, *viz.*, the right of free movement throughout the Indian territory, regarded as an independent and additional right apart from the general right of locomotion emanating from the freedom of person, which is dealt with in Art. 21.<sup>4</sup>

**Restrictions upon the freedom of movement.**

An order of externment is a restriction or abridgement of the right to freedom of movement guaranteed by Art. 19 (1) (d).<sup>3</sup>

**Restrictions in the interests of the general public.**—See p. 81-2 *ante*, as to the meaning of 'interests of the general public'.

*Illustrations.*

(i) A provision for the externment of persons whose presence in a particular locality may jeopardise the peace and safety of the citizens of that locality (*e.g.*, s. 27 of the City of Bombay Police Act, 1902) is a restriction of the freedom of movement of such persons in the interests of the general public.<sup>4</sup>

(ii) A person suffering from an infectious disease may be prevented from moving about and spreading the disease and regulations for his segregation may be introduced. Likewise, healthy people may be prevented, in the interests of the general public, from a plague-infected area. There may be protected places, *e.g.*, forts or other strategic places, access whereunto may have to be regulated or even prohibited in the interests of the general public.<sup>5</sup>

**Reasonableness of Restrictions.****1. Whether grounds must be communicated to the externnee.**

1. In *Khare case*,<sup>6</sup> the impugned law was challenged on the ground that it made no provision for furnishing the grounds of externment

1. *State of Madras v. Row*, (1952) S.C.R. 597.

2. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.

3. *Khare v. State of Delhi*, (1950) S.C.R. 519.

4. *Gurbachan v. State of Bombay*, (1952) S.C.R. 737.

5. *Gopalan v. State of Madras*, (1950) S.C.R. 88.



to the person externed. The Supreme Court assumed the necessity for such communication in order to make the restriction reasonable, but held, on a construction of the Act, that the impugned Act did in fact contain such provision. The majority of the Supreme Court held that the Act had given a right of representation to the detenu and that "he cannot make a representation unless he has been furnished grounds for the order."

Following this decision it has been held<sup>6</sup> that a law which imposes a restriction upon the freedom of movement shall be void owing to unreasonableness of the restriction if there is no provision for communicating the grounds to the person against whom the order is to be made.

2. It may also be taken as established that a law of externment or internment would be void if it does not offer a right of representation or an opportunity to be heard to the person against whom the order is made.<sup>6,7</sup>

## II. What particulars should be communicated.

1. In *Khare's case*<sup>8</sup> it was acknowledged by the Court that the grounds communicated by the Court should not be 'vague, insufficient or incomplete'. It was, however, held on the facts of the case, that the particulars supplied were sufficient having regard to the fact that the circumstances referred to in the order were *patent*.

2. The Calcutta High Court has held<sup>9</sup> that "a man served with an order of externment should be told enough so that he could make some, "representation" and that, accordingly, merely to state that he was committing a 'subversive act' without mentioning the particulars thereof was not sufficient. But where the communication stated that the person "is likely to do a subversive act, viz., an act likely to endanger communal harmony, e.g., instigating local Muslim to boycott the Hindus", held, that the ground stated was not vague or indefinite."

3. But in respect of a law which provided for the externment of a previous convict, when the specified authority was satisfied that he was likely again to engage himself in the commission of an offence similar to that for which he had previously been convicted, the Supreme Court has held that it was sufficient that the "general nature of the material allegations" against him were communicated. Such a law could not be impeached as unreasonable because it did not require further particulars to be supplied to the person dealt with, for, in the very nature of things, particulars such as could be established in a court of law could not be furnished in such a case and the externment must be based largely on suspicion, having regard to the previous conviction.<sup>10</sup>

## III. Whether it is reasonable to vest power in the Executive to be exercised on its subjective satisfaction.

1. The object and nature of the legislation must be taken into account in determining whether the restrictions imposed by it are reasonable. Thus, in a law of an *extraordinary* nature, viz., the removal of persons who have become a menace to the safety of the public residing in a locality and against whom witnesses may not be willing

6. *Ismail v. State of Orissa*, A. 1951 Orissa 86.

7. *State v. Motilal*, A. 1952 M.B. 114.

8. Cf. *Hari v. D. C. of Police*, (1956) S.C.R. 506.

9. *Khagendra v. D.M.*, (1950) 55 C.W.N. 53 (56); *Jatish v. B. K. Sinha*, (1950) 55 C.W.N. 104.

10. *Atar Ali v. Joint Secy.*, (1950) 55 C.W.N. 94.

11. *Hari v. D. C. of Police*, (1956) S.C.R. 500 : A. 1956 S.C. 550.

to depose publicly, the very object of the law would be defeated if the suspect were allowed to cross-examine the witnesses deposing against him.

Having regard to the extraordinary nature of such legislation, therefore, it cannot be struck down as imposing an 'unreasonable' restriction upon the freedom of movement guaranteed by Art. 19 (1) (d), merely because it denies to the suspect the right to cross-examine the witnesses examined against him,<sup>12</sup> or because it enables the Executive Officer to extern a person whenever he is subjectively satisfied that witnesses are not willing to come forward to give evidence against the suspect;<sup>13</sup> or that a previously convicted person is likely to engage himself again in the commission of an offence similar to that for which he had previously been convicted.<sup>14</sup>

2. In *Khare* case<sup>15</sup> it had been laid down by the Supreme Court that a law of externment is not unconstitutional merely because it leaves the necessity of making the order of externment to the subjective satisfaction of a particular officer. In the impugned Act in that case [as in the Preventive Detention Act] this authority was conferred upon some specified officers of superior rank.<sup>16</sup> The Supreme Court<sup>17</sup> had no opportunity to consider the reasonableness of conferring such power upon any officer irrespective of his rank or capabilities to discharge such a serious function. In the later case of *Hari v. D.C. of Police*<sup>18</sup> also, the Legislature had conferred the power on certain police officers and magistrates of the higher rank.

3. In the Calcutta case of *Khagendra v. D.M.*,<sup>19</sup> the Legislature had not performed its own function to specify the officers who could make the order, but empowered the State Government to delegate its power of making the order to any officer irrespective of his rank, knowledge or responsibility. The High Court held that it was an unreasonable restriction within the meaning of Art. 19 (5). The same view has been taken by the Madhya Bharat High Court.<sup>20</sup>

#### IV. Whether a law for externment is unreasonable on the ground that it does not specify the maximum period of externment.

The majority view in *Khare's* case<sup>21</sup> was that the law could not be held to be unreasonable on the above ground, if there were other safeguards. Following this decision, it has been held by the Assam High Court<sup>22</sup> that where the law itself does not fix the maximum but leaves it to be fixed by the Magistrate subject to appeal to the Court of Sessions, the law is not unreasonable.

#### V. Whether provision for an Advisory Board is essential to make the law reasonable.

It cannot be laid down as a universal rule that unless there is a provision for an Advisory Board to scrutinise the materials on which

12. *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 : (1952-54) C.C. 178.

13. *Bhagubhai v. D.M.*, (1956) S.C.R. 533 : A. 1956 S.C. 585.

14. *Khare v. State of Delhi*, (1950) S.C.R. 519 : (1950-51) C.C. 52 : A. 1950 S.C. 211.

15. So also in *Gurbachan v. State of Bombay*, A. 1952 S.C. 221 (224) : (1952) S.C.R. 737.

16. *Hari v. Deputy Commissioner*, (1956) S.C.R. 506 523 : A. 1956 S.C. 559.

17. *Khagendra v. D.M.*, (1950) 55 C.W.N. 53 (59).

18. *State v. Motilal*, A. 1952 M.B. 114.

19. *Israil v. The State*, A. 1951 Assam. 106 (118).



action is taken, the legislation providing for externment must necessarily be condemned as unreasonable.<sup>20</sup> Reasonableness may rest on other safeguards, such as an appeal to the State Government, right to challenge the order in Court on certain grounds.<sup>21</sup>

**Arts 19 (1) (d) and 21.**

The object of Art. 19 (1) (d) is to guarantee to a citizen the right to move freely 'throughout the territory of India' without any discriminatory barriers.<sup>22</sup>

Art. 19 has no application to a legislation dealing with preventive (Art. 22) or punitive (Art. 21) detention as its *direct* object. If there is a legislation directly attempting to control a citizen's freedom of speech or his right to assemble peacefully etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive, or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 will not arise.<sup>23</sup>

**Constitutionality of some Central Acts with reference to Art. 19 (1) (d):**

**Bombay Police Act, 1951:**

*Held valid.*—S. 57,<sup>24</sup> 59,<sup>25</sup> 56.<sup>26, 27</sup>

**City of Bombay Police Act, 1902:**

*Held valid.*—S. 27 (1).<sup>28</sup>

**East Punjab Public Safety Act, 1949:**

*Held valid.*—S. 4 (1) (c).<sup>29</sup>

**Passport Act, 1920:**

*Held valid.*—S. 3.<sup>30</sup>

**Cl. (1) (e): Freedom of residence.**

1. The object of this clause is the same as that of cl. (1) (d), viz., to remove internal barriers within India or between any of its parts, and the freedom guaranteed by cl. (1) (e) has to be construed similarly, viz., with reference to the words 'territory of India'.

**Reasonableness of restrictions.**

**(A) Substantive.**

(i) Passport regulations for entry from abroad can be reasonably imposed even upon citizens of India.<sup>1, 2</sup>

20. *Harl v. Deputy Commr.*, (1956) S.C.R. 506 : A. 1956 S.C. 559.

21. *Khare v. State of Delhi*, (1950) S.C.R. 519 : A. 1950 S.C. 211.

22. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (133).

23. *Bhagubhai v. Dt. Magistrate*, (1956) S.C.R. 533 : A. 1956 S.C. 585.

24. *Gurbachan v. State of Bombay*, (1952) S.C.R. 737 : A. 1952 S.C. 221.

25. *Abdul Rahim v. State of Bombay*, A. 1960 S.C. 1315 (1316).

1. *Ebrahim v. State of Bombay*, (1954) S.C.R. 933 (950) : A. 1954 S.C. 229.

2. *Abdul Rahim v. State of Bombay*, A. 1959 S.C. 1315 (1316).

(B) *Procedural.*

The removal of a citizen from India on the subjective satisfaction of the Executive and without giving him an opportunity of showing cause is an unreasonable restriction upon the right guaranteed by Art. 19 (1) (e).<sup>2a</sup>

**Constitutionality of some Acts with reference to Art. 19 (1) (e):****Bombay Police Act, 1951:**

*Held valid.*—S. 57.<sup>3</sup>

**Passport Act, 1920:**

*Held valid.*—S. 3 (1).<sup>1,3</sup>

**Cl (1) (f): Freedom of property.**

1. This clause guarantees the right of private property, viz., that a man is free to acquire any property by any lawful means and to hold it as his own and to dispose of it at his will, subject, however, to reasonable restrictions that the State may impose in the interests of the 'general public' or of the Scheduled Tribes. Further, the freedom is subject to the paramount right of the State to take away the property by legislation as well as the right of the State to acquire private property for public purposes on payment of compensation (Art. 31, *post*).

2. Art. 19 (1) (f) applies equally to concrete as well as abstract rights of property.<sup>4a</sup>

3. On the other hand, Art. 19 (1) (f) has no application—

(a) Where right of property of one individual citizen has been violated by another.<sup>4</sup>

(b) Where the State seeks to exercise its rights under the ordinary law as owner of property as distinguished from its sovereign rights.<sup>5</sup>

**Arts. 19 (1) (f) and 31.**

1. Arts. 19 (1) (f) and 31 appear to be mutually exclusive. Art. 19 (1) (f) applies so long as a person is not 'deprived' of his property by a law enacted by a competent Legislature, under Art. 31 (1)<sup>6,7</sup> or 31 (2).<sup>8,9</sup>

2. Some difficulty appears to have been felt by Sinha J.<sup>10</sup> of the Calcutta High Court in the case of requisitioning, on the ground that it was not quite clear whether it constituted a substantial 'deprivation' as distinguished from a mere restriction. But such difficulty, it is submitted, should not exist after 'requisitioning' has been specifically included in Art. 31 (2) in place of the original vague expression 'taking possession of'. It being specifically included in Art. 31 (2), must come out of Art. 19 (1) (f).<sup>9</sup>

3. *Hari v. Dy. Commr.*, A. 1956 S.C. 559 (568).

3a. *Commr., H.R.E. v. Lakshmindra*, (1952-54) 2 C.C. 191 (196): (1954) S.C.R. 1005.

4. *Shamdasani v. Central Bank*, (1950-51) C.C. 68: A. 1952 S.C. 59.

5. *Dhirendra v. State of W. B.*, A. 1956 Cal. 437 [requires further consideration].

6. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (919), Das J.: (1950-51) C.C. 10 (24).

7. *Nathubhai v. Municipal Corpn.*, A. 1959 Bom. 332.

8. *Kamaksha Narain v. Collector*, (1956) S.C.A. 494 (499).

9. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (780).

10. *Luxmi Janardan v. State of W. B.*, (1958) 63 C.W.N. 101 (126).

2a. *Ebrahim v. State of Bombay*, (1954) S.C.R. 933.



**'Property'.**

1. The rights of property guaranteed by Art. 19 (1) (f) mean the rights which, by themselves and taken independently, are capable of being acquired, held or disposed of as 'property'.<sup>11</sup>

Hence, restrictions on rights or privileges which are appurtenant to or flow from the ownership of property are not restrictions upon the right guaranteed by Art. 19 (1) (f).<sup>12</sup> Similarly, an office<sup>13</sup> which subsists only during the pleasure of another person or a personal covenant which does not run with the land<sup>14</sup> is not 'property' within the meaning of this article.

2. There is no reason why the word "property", as used in Article 19 (1) (f) of the Constitution, should not be given a liberal and wide connotation and should not be extended to those well-recognised types of interest which have the insignia and characteristics of proprietary right.<sup>15</sup> 'Property', in this clause, has a wider connotation than in Art. 31 (2), and thus includes 'money'.<sup>16a</sup>

'Property', includes not only real and personal property but also incorporeal rights such as patents, copyrights, leases, choses in action and every other thing of exchangeable value which a person may have.<sup>17</sup> Thus, the beneficial interest of the head of a Hindu religious endowment, such as a mutt, is 'property'.<sup>18</sup> So is also a decree of Court,<sup>14</sup> or the right to hold a fair on one's own land.<sup>19</sup>

"To hold" means to possess the property, and to enjoy the benefits which are ordinarily attached to its ownership.<sup>20</sup> Interference with the right of enjoyment is, therefore, a restriction of the right to hold property.<sup>21</sup>

"To acquire" means to become owner of the property. Ownership involves the right of user, of taking produce and of destruction or disposition.

**Restrictions in the interests of the general public.**

As to the meaning of 'interests of the general public' see pp. 81-82, *ante*. The following are some instances of restrictions imposed upon the right of property, in the interests of the general public:

1. Control of accommodation in urban areas in view of shortage of houses<sup>22</sup> or control of rent.<sup>23</sup>

2. Agrarian reform by way of reduction of rent,<sup>24</sup> or relief of indebtedness.<sup>25</sup>

3. Restriction of the rights of management of a Company by its shareholders, by appointing Directors, in order to secure the supply of a commodity essential to the community and to prevent a serious unemployment amongst a section of the people.<sup>26</sup>

11. *Purushottam v. Venkatappa*, A. 1952 Mad. 150.

11a. *Mahadeo v. State of Bombay*, (1950) 2 S.C.A. 154.

12. *Commr., H.R.E. v. Lakshmindra*, (1952-54) 2 C.C. 191 : (1954) S.C.R. 1005 : A. 1954 S.C. 282.

12a. *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (334).

13. *Shirur Mutt v. Commissioner*, (1952) 1 M.L.J. 557 (581); *Dwarkanadas v. Sholapur Co.*, A. 1951 Bom. 86.

14. *Mahbub v. Hyderabad State*, A. 1951 Hyd. 1.

15. *Ganpati v. State of Afmer*, (1955) 1 S.C.R. 1065.

16. *Chitrangit Lal v. Union of India*, A. 1951 S.C. 41 (57).

17. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777.

18. *Venkatachellum v. Kabalamurthy*, A. 1953 Mad. 350.

19. *Iswarei Prasad v. N. R. Sen*, A. 1952 Cal. 273 (273) : 55 C.W.N. 719.

20. *Raja of Bobbili v. State of Madras*, A. 1952 Mad. 203 (212).

21. *Jannalal v. Kishendas*, A. 1955 Hyd. 194.

4. A law of pre-emption<sup>22</sup> or consolidation of holdings,<sup>23</sup> the object of which is to prevent fragmentation of holdings and to preserve the homogeneity of the village community<sup>24</sup> imposes a restriction upon the right conferred by Art. 19 (1) (f) in the interests of the general public.

But a law or custom which gives a right of pre-emption on the mere ground of vicinage,<sup>24</sup> or relationship<sup>25</sup> contravenes Art. 19 (1) (f).

On the other hand,—

No public interest is served by taking one's property to give it to another individual.<sup>1</sup>

### Reasonableness of restrictions.

#### (A) Substantive aspect.

#### Instances of 'reasonable' restrictions.

1. The restrictions upon the right of property imposed by the Administration of Evacuee Property Act are not excessive or unreasonable, having regard to the most abnormal and unusual situation caused by mass migration between India and Pakistan owing to the communal disturbances, which the impugned legislation was intended to deal with.<sup>2-3</sup>

2. The restrictions imposed by the Madras Agriculturists' Relief Act (IV of 1938) are not unreasonable, having done nothing more than to redress an admittedly serious state of affairs, namely, imminent ruination of the agriculturists by prices falling down and interest mounting up,—taking care, however, to see that the creditors were not also put to any hardship, by preserving their capital in tact and ensuring reasonable rates of interest.<sup>4</sup>

3. Prohibition of possession, consumption, buying or selling of wines, by a law of prohibition, is a 'reasonable restriction' upon the right to 'acquire, hold and dispose of property' conferred by Art. 19 (1) (f), having regard to the Directive Principle in Art. 47; but similar prohibition in regard to toilet and medicinal preparations containing alcohol is an 'unreasonable restriction' within the meaning of Art. 19 (5). The possession or consumption of medicinal and toilet preparations which is excepted even by Art. 47 cannot be reasonably prohibited simply because of the possibility of their being misused by some perverted addicts.<sup>5</sup>

On the other hand, though 'prohibition' of consumption etc. of toilet and medicinal preparations containing alcohol constitutes an unreasonable restriction, a power to regulate the consumption or sale of such preparations may be necessary in order to carry out a law of prohibition relating to intoxicating liquors. Such regulation is not an 'unreasonable' restriction upon the right to property, for such regula-

22. *Abdul v. Jan Mohd.*, A. 1951 All. 247; *Ramchandra v. Janardhan*, A. 1955 Nag. 225 (F.B.); *Ullam v. Kartar*, A. 1954 Punj. 55 (F.B.).

23. *Aftar Singh v. State of U.P.*, A. 1959 S.C. 564.

24. *Moti Bai v. Kandkari*, A. 1954 Hyd. 161; *Shankerlal v. Poonamchand*, A. 1954 Raj. 231; *Babulal v. Gowardhan*, A. 1956 M.B. 1 (F.B.). [*Contra Sardha v. Haji*, A. 1960 Punj. 196 (F.B.)].

25. *Behram v. Phusa*, A. 1955 Raj. 144.

1. *Subodh Gopal v. Bihari*, (1951) 55 C.W.N. 433; *Bankey v. Jhingan*, A. 1952 Pat. 166 (171); *Mahabub v. Hyderabad State*, A. 1951 Hyd. 1.

2. *Abdul Majid v. Nayak*, A. 1951 Bom. 440 (457).

3. *Sodhu Ram v. Custodian-General*, (1955) 2 S.C.R. 1113 (1116).

4. *Krishnamurthy v. Venkateswaran*, A. 1952 Mad. 11 (16).

5. *State of Bombay v. Balsara*, (1951) S.C.R. 682; (1950-51) C.C. 309.

6. *Nageswara v. Madras State*, A. 1954 Mad. 643.



tion is necessary in order to prevent the evasion of prohibition laws.<sup>9</sup> It is an ancillary power derived from Entry 8 of List II.<sup>1</sup>

4. A notification which prohibited the export of goods in any place outside that area except with the permission of the Government, the object of which was to regulate the supply and demand of cotton and to control the price and to prevent the export of the goods outside India,—was a reasonable restriction in the interests of the public.<sup>8</sup>

5. A temporary law of rent control passed in order to meet an abnormal scarcity of accommodation<sup>9</sup> which gives the landlord a right to move the Civil Court for fixation of reasonable rent, if he is not satisfied with the District Magistrate's assessment of the reasonable rent, cannot be said to be 'unreasonable'.<sup>10</sup>

6. S. 96 (1) of the Criminal Procedure Code which authorises search and seizure of documents for the purposes of investigation does not constitute any unreasonable restriction upon the right guaranteed by Art. 19 (1) (f). A search, by itself, is no 'restriction' at all on the right to hold and enjoy property. No doubt a seizure and carrying away of documents is a restriction of the possession and enjoyment of the property seized. This is, however, a reasonable restriction, being only a temporary interference for the limited purpose of an investigation. Statutory regulation in this behalf is also necessary in the public interest.<sup>11</sup>

7. A temporary enactment which seeks to protect tenants, holding over after the expiry of lease, from eviction, in the natural interest of increasing the production of foodgrains, cannot be held to constitute an unreasonable restriction upon the landlords' rights.<sup>12</sup> Nor is it unreasonable to provide that a landlord, who is not himself a tiller of the soil, should assure to the actual tiller some fixity of tenure.<sup>13</sup>

8. A law fixing a reasonable rent from cultivating tenants, even when it is retrospective in operation.<sup>14</sup>

#### (B) Procedural Aspect.

##### Instances of unreasonable restrictions.

1. When a law deprives a person of the possession of his property for an indefinite period of time merely on the *subjective* determination of an executive officer, such law can on no construction be described as a 'reasonable' restriction on the freedom of property.<sup>14</sup>

##### Illustration.

S. 112 of the Ajmer Tenancy & Land Records Act, 1950 provided that if a landlord habitually infringed the rights of a tenant under the Act, he would be deemed to be a landlord disqualified to manage his own property, and the property would be taken under the Court of Wards. The determination of the question whether a landlord had habitually infringed the rights of his tenants was left to the Court of Wards. Held, the section was void, being an unreasonable restriction on the

7. *Vino C. & P. Works v. State of M. P.*, A. 1956 Nag. 1 (5).

8. *Kandaswami v. Textile Commr.*, (1951) II M.L.J. 658.

9. *Iswari Prosad v. N. R. Sen*, A. 1952 Cal. 273.

10. *Ram Krishna v. Radhamai*, A. 1952 All. 697.

11. *M. P. Sharma v. Satish*, (1952-54) C.C. 288.

12. *Inde Singh v. State of Rajasthan*, A. 1957 S.C. 510 : (1957) S.C.R. 605.

13. *Shri Kishan v. State of Rajasthan*, (1955) 2 S.C.R. 531 (540) : A. 1955 S.C. 795.

14. *Raghubir v. Court of Wards*, (1953) S.C.R. 1049 : (1952-54) 2 C.C. 187.

right to property as it made the enjoyment of that right depend entirely on the mere discretion of the executive.<sup>14</sup>

2. But the law cannot be said to be unreasonable if the executive officer is required to give reasons for the exercise of his discretion and his order is subject to revision by an administrative superior.<sup>15</sup>

3. A law which affects rights of property without providing for a notice or hearing to the persons affected, constitutes an unreasonable restriction, e.g., the revocation of a license for running a boarding house;<sup>16</sup> declaring a place as a 'market' under a Municipal law.<sup>17</sup>

**Proprietary rights of the head of a Hindu religious endowment and the power of the State to impose restrictions thereupon.**

1. Both office and property are blended in the head of a Hindu religious institution and the beneficial interest of the head in the property of the institution is a 'property' within the meaning of Art. 19 (1) (f). The State may, no doubt, impose reasonable restrictions upon this right of property, in the interests of the general public, under Art. 19 (5), but since the proprietary interest is conferred upon the head by the rules of customary law relating to Hindu religious endowments in order to enable him to discharge his religious duties efficiently, the restrictions imposed by the State would cease to be reasonable if they render the head unfit to discharge the religious duties called for by the endowment.<sup>17</sup>

2. The head has large powers of disposal over the surplus income of the institution subject to the only restriction that he cannot spend anything out of it for his personal use unconnected with the dignity of his office. Hence, any law which takes away from the head his right to spend the surplus income or make its exercise subject to previous sanction or directions issued by an administrative authority, constitutes an unreasonable restriction within the meaning of Art. 19 (5). Such restrictions are inconsistent with the dignity of his office.<sup>17, 18</sup>

3. Similarly, where the head has an unrestricted power of disposal over personal gifts, known as *Pathakanikas*, a law which requires the head to keep accounts of the receipts and expenditure of such personal gifts to be submitted to an administrative authority, constitutes an unreasonable restriction upon his rights of property.<sup>17</sup>

4. The head of a religious institution has the right to manage the properties of the institution, though the State can interfere in case of negligence or maladministration. If a law empowers an administrative authority to take away this right of management, at any time, at its absolute discretion, and to vest the administration in a manager subject to the control of the administrative authority, this would obviously constitute an unreasonable restriction inasmuch as it would cripple the authority of the Mahant altogether and reduce him to the position of a priest or paid servant, contrary to the tenor of his office.<sup>17</sup>

5. The State has the right to have a scheme settled for the due administration of a religious endowment. But since this would take away or restrict the right of the Mahant to administer the endowment, the power of the State must be exercised on reasonable grounds, e.g., in case of negligence or maladministration and in a reasonable manner, e.g., through the machinery of the judicial procedure, so that the

15. Cf. *Commr. of Calcutta Police v. Rolla Ram*, (1947) 51 C.W.N. 833.

16. *Kamal v. Corpn. of Calcutta*, A. 1960 Cal. 172.

17. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191 : A. 1954 S.C. 282.

18. *Jagannath v. State of Orissa*, (1952-54) 2 C.C. 191 : A. 1954 S.C. 400 : (1954) S.C.R. 1046



aggrieved person may have his rights tested in a court of law. Hence, where a law authorises an administrative authority to take away the management from the Mahant or to settle a scheme without judicial intervention, it constitutes an unreasonable restriction.<sup>18a</sup> If, however, an appeal to the courts is provided for,<sup>19</sup> or the decision of the administrative authority is liable to be challenged by a suit, it may not be said to be an unreasonable restriction.<sup>17</sup>

On the other hand, the following restrictions *cannot* be said to be unreasonable:

Restrictions imposed for the purpose of carrying out the objects of the trust and for the better administration, protection and preservation of the trust property.<sup>20</sup>

**Constitutionality of some Central Acts with reference to Art. 19 (1) (f):**

**Ajmer Tenancy and Land Records Act, 1950:**

*Held invalid.*—S. 112.<sup>21</sup>

**Bihar Hindu Religious Trusts Act, 1951:**

*Held valid.*—Ss. 28,<sup>22</sup> 32.<sup>20</sup>

**Bombay Labour Welfare Fund Act, 1953:**

*Held valid.*—S. 3 (1)-(2) [in so far as they refer to fines].<sup>23</sup>

*Held invalid.*—S. 3 (1) [in so far as it applies to unpaid accumulations].<sup>22</sup>

**Bombay Prohibition Act, 1949:**

*Held valid.*—S. 13 (b), in so far as it affected the consumption of medical and toilet preparations containing alcohol.<sup>24</sup>

**Electricity Act, 1910:**

*Held valid.*—S. 28 (1).<sup>24</sup>

**Essential Commodities Act, 1955:**

*Held valid.*—Ss. 3 (2), (3).<sup>25</sup>

**Employees Provident Fund Act, 1952:**

*Held valid.*—S. 5.<sup>1</sup>

**Government Premises Eviction Act, 1950:**

*Held invalid.*—Whole Act.<sup>2</sup>

**Import Control Order, 1955:**

*Held valid.*—Cl. 9 (a).<sup>2</sup>

18a. *Jagannath v. State of Orissa*, (1954) S.C.R. 1046.

19. *Sadasib v. State of Orissa*, (1956) S.C.R. 43 (55) : A. 1956 S.C.

432.

20. *Moti Das v. Sahi*, A. 1959 S.C. 942 (949).

21. *Raghubir v. Council of Wards*, (1953) S.C.R. 1049.

22. *Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122 (1148-49).

23. *State of Bombay v. Balsara*, (1951) S.C.R. 682.

24. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

25. *Thanmal v. Union of India*, A. 1959 Raj. 206.

1. *Hindusthan Electric Co. v. R. P. F. Commr.*, A. 1959 Punj. 27.

2. *Satish v. Delhi Improvement Trust*, A. 1958 Punj. 1.

3. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240).

**Income Tax Act, 1922:***Held valid.*—Ss. 46 (2).<sup>4</sup>**Land Acquisition Act, 1894:***Held valid.*—Ss. 6 (3);<sup>5</sup> 17 (4).<sup>6</sup>**Madras Hindu Religious and Charitable Endowments Act, 1951:***Held invalid.*—Ss. 30 (2)<sup>7</sup>; 31<sup>8</sup>; 55<sup>9</sup>; 63-69<sup>10</sup>; 87<sup>11</sup>.**Madras Revenue Recovery Act:***Held valid.*—S. 48.<sup>12</sup>**Non-Ferrous Metal Control Order, 1958:***Held valid.*—Cls. 3<sup>13</sup>; 4<sup>14</sup>.**Orissa Co-operative Societies Act, 1952:***Held valid.*—S. 133.<sup>15</sup>**Orissa Hindu Religious Endowments Act, 1939:***Held invalid.*—Ss. 38-39<sup>16</sup>; Prov. to s. 46<sup>17</sup>.**Orissa Hindu Religious Endowments Act, 1951, as amended in 1954:***Held valid.*—Ss. 42 (1) (b); 42 (7); 44 (2); 74 (3); 79A.<sup>18</sup>**Sea Customs Act, 1949:***Held invalid.*—S. 178A.<sup>19</sup>**Sugar Export Promotion Act, 1956:***Held valid.*—Whole Act.<sup>20</sup>**Cl. (1) (g): Freedom of profession, trade, business.**

(A) 1. This freedom means that every citizen has the right to choose his own employment or to take up any trade or calling, subject only to the limits as may be imposed by the State in the interests of the public welfare, and the other grounds mentioned in cl. (6).

2. The Constitution does not recognise 'franchises or rights to business which are dependent on grants by the State, or 'business affected with public interest', meaning, business which are particularly liable to control by the State. Under *our* Constitution, any citizen has the right to engage in any business which is known to the common law, as of right, and the State has the power to regulate or restrict any business on the grounds specified in cl. (6).<sup>21</sup> Thus, every citizen has

4. *Collector of Malabar v. Hajee*, (1957) S.C.R. 970 (977).

5. *Aurora v. State of U. P.*, A. 1958 All. 126.

6. *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

7. *Pubbiri v. Govinda*, A. 1958 Mad. 147.

8. *Collector of Malabar v. Ebrahim*, (1957) S.C.R. 970 (977).

9. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

10. *Bharat v. Asstt. Registrar*, A. 1958 Orissa 217.

11. *Jagannath v. State of Orissa*, (1954) S.C.R. 1046 : A. 1954 S.C.

400.

12. *Sadasib v. State of Orissa*, (1956) S.C.R. 43 : A. 1956 S.C. 432.

13. *Nathella v. Collector of Customs*, (1950) 2 M.L.J. 35.

14. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1135).

15. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.



a right to sell vegetables in the public market<sup>16</sup> or to carry on the business of transport on the public streets<sup>17</sup> subject only to restrictions as are warranted by cl. (6) of Art. 19.

3. The right to carry on a business implies a right not to carry it on, if he so chooses, and nobody can be compelled to carry on a business against his will.<sup>17,18</sup>

(B) On the other hand,—

1. Where the right to carry on any profession is *created by a statute*, the exercise of that right is subject to the terms and conditions imposed by the statute, and no fundamental right is infringed to such terms and conditions, e.g., the right to practise before a Court of law,<sup>19</sup> or a tribunal<sup>20</sup> or to get a licence for carrying on a trade.<sup>21</sup>

Hence,

(i) There is no violation of the present clause where a legal practitioner is prohibited<sup>22</sup> from appearing before a tribunal or his right to appear is made subject to permission of the tribunal.<sup>24</sup>

(ii) On the same principle, it has been held that there being no fundamental right to stand as a candidate for election to a municipal body, there is no infringement of any fundamental right if the Legislature lays down that if a person wants to stand as a candidate for election he shall not either be employed as a paid legal practitioner on behalf of the municipality or act as a legal practitioner against the municipality.<sup>25</sup>

2. Nor is there any fundamental right to do a thing which can arise only out of a grant or contract, e.g.—

(i) The right to enter into another's land to catch and carry away fish<sup>26</sup> or to work a mine on another's land.<sup>1</sup> The position is different where the contract creates a proprietary interest, e.g., the right to take away soil or to build upon the land.<sup>14</sup>

(ii) Similarly, there is no common law right to be *recognised* by the Government as the agent of a traveller for the purposes of application for passport.<sup>2</sup> A denial of such a claim to a travel agency cannot accordingly be held to constitute an infringement of its fundamental right to carry on the business of travel agency.<sup>3</sup>

3. Though a citizen has the fundamental right to carry on any business of his choice, there is no right to carry on businesses inherently dangerous<sup>4</sup> to the society, so that such businesses may be absolutely

16. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 : (1950-51) C.C. 61.

17. *Indian Metal Corpn. v. Industrial Tribunal*, A. 1953 Mad. 98 (101).

18. But in *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676 (709), there is an observation that the negative right may not be within the protection of the Constitution as a 'fundamental' right.

19. *Mulchand v. Mukund*, A. 1952 Bom. 296; *Ananthakrishnan v. State of Madras*, A. 1952 Mad. 395 (402).

20. *Jagjit v. State of Hyderabad*, A. 1954 Hyd. 28; *Rangaswami v. Industrial Tribunal*, A. 1954 Mad. 553.

21. *Mahaboob v. Dy. Commr.*, A. 1952 Assam 145.

22. *Digambar v. Nanda*, A. 1957 Orissa 281.

23. *Bharat v. Asstt. Registrar*, A. 1958 Orissa 217 (220).

24. *Sakhawant v. State of Orissa*, (1952-54) 2 C.C. 155 : A. 1955 S.C. 166.

25. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919 : A. 1956 S.C. 17.

1. *Shirji v. Union of India*, A. 1959 Panj. 510 (512).

1a. *Mahadeo v. State of Bombay*, (1959) 2 S.C.A. 154 (164).

2. *Mediator Co. v. State of W. B.*, A. 1958 Cal. 634.

3. *Coverjee v. Excise Commr.*, (1954) S.C.R. 873.

prohibited or permitted to be carried only under the licence of the State, e.g., dealing in liquor.<sup>4</sup>

4. Art. 19 (1) (g) does not confer on any individual or association the monopoly right to carry on any trade or business. Hence, if by reason of any State action, an element of competition is introduced into a trade, the existing trader or traders who might have been enjoying a monopoly in the trade cannot complain of the infringement of their fundamental right conferred by this Article.<sup>5</sup>

#### Illustration.

By a notification of 1952, the Regional Transport Authority invited applications for permits to ply small taxis of not exceeding 19 H.P. and not below 10 H.P., at a cheaper tariff than bigger taxis with a higher H.P. The contention on behalf of the association of existing bigger taxis was that the notification interfered with their right under Art. 19 (1) (g) to carry on business by reason of the introduction of taxis at cheaper rates.

Negating this contention, the Supreme Court observed—

"Nobody has denied to the appellants the right to carry on their own occupation and to ply their taxis. If other persons are also allowed the right to carry on the same occupation and an element of competition is introduced in the business, that does not, in the absence of any bad faith on the part of the authorities, amount to a violation of the fundamental right guaranteed under Article 19 (1) (g) of the Constitution".<sup>6</sup>

5. There is no fundamental right in a citizen to carry on business *wherever* he chooses and his right must be subject to any reasonable restriction imposed by the Executive in the interest of public convenience.<sup>7</sup>

#### Illustrations.

(f) In exercise of the power conferred by r. 68 (2) (r) of the Motor Vehicles Act, 1939, the Transport Authority had made a resolution directing that a bus-stand should not be used for certain specified journeys, by reason of which the Petitioner who was a licensee of that bus-stand was affected.

*Held*, that though under Art. 19 (1) (g), a citizen had the right to carry on any trade, occupation or business, it was not an absolute right but was subject to reasonable restrictions imposed under clause (6). Thus, the right guaranteed by clause (1) (g) was not an unrestricted right to carry on any business *anywhere*. The State might impose reasonable restrictions as to the site where a business may be carried on, in the interest of public convenience. The impugned rule (read with the section under which it was made) authorised the regulation of the starting places of buses in the interest of public convenience and was, accordingly, saved by cl. (6).<sup>8</sup>

(H) There is no fundamental right to carry on the profession of a scribe or petition writer, in the Collectorate compound.<sup>9</sup>

6. While a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual doing business with him. Any individual, as well as the Government, has got a right to enter into a contract with a particular person<sup>10</sup> or to determine the persons with whom he

4. *Nagendra v. Commr.*, A. 1958 S.C. 398.

5. *Harnam Singh v. R. T. A.*, (1952-54) 2 C.C. 129 : (1954) S.C.R. 371.

6. *Ibrahim v. R. T. A.*, (1952-54) 2 C.C. 217 : (1953) S.C.R. 290.

7. *Yasin v. Dt. Magistrate*, A. 1954 All. 317.

8. *Vedachala v. Divisional Engineer*, A. 1955 Mad. 365.



or it will deal;<sup>9</sup> and no citizen has a *fundamental right* to insist upon the Government doing business with him,<sup>10</sup> even though he may have a right under the ordinary law to sue for specific performance or damages for breach of contract, in proper cases.<sup>11</sup>

#### Illustrations.

(i) There is no violation of any fundamental right when Government refuses to enter into a contract with a contractor who has been 'blacklisted'.<sup>12</sup>

(ii) While an author or publisher has a fundamental right to print, publish and sell any book, he has no fundamental right to obtain recognition or approval of the Government that the books so printed or any of them should be prescribed as text-books in Government recognised schools.<sup>13</sup>

#### Right to enter into contract.

1. The right to *enter* into a contract relating to property or business is a fundamental right guaranteed by Art. 19 (1) (f)-(g). But rights arising *under* a contract are *not* fundamental rights guaranteed by our Constitution.<sup>14</sup> It is, accordingly, competent for the State to supersede by legislation contractual rights and obligations, including those arising under contracts made by the Government itself under Arts. 298-9.<sup>15</sup> Thus, a grant made by the State cannot deprive the Legislature of its power to vary the terms of the grant or to derogate from it.<sup>16</sup> Nor is the State debarred from controlling prices by legislation on the ground that it would affect the incidents of Government contracts.<sup>17, 18</sup>

2. It has already been stated [p. 106, *ante*] that there is no fundamental right to enter into contractual relations with the Government.<sup>19</sup>

#### 'Law'.

Law in this context postulates a law which is otherwise valid. Hence, any imposition, which restricts a citizen's right to carry on an occupation, trade or business, but is not authorised by law, cannot be covered by clause (6) and must, accordingly, be held to be invalid, being in contravention of clause (1) (g).<sup>20</sup>

Thus,—

- (a) A bye-law<sup>21</sup> or order<sup>22</sup> or rule<sup>23</sup> which is *ultra vires*; or
- (b) A rule<sup>24</sup> or order<sup>25</sup> which has not been duly published<sup>26</sup> or laid before Parliament,<sup>27</sup> as required by the statute; or
- (c) A sales tax which contravenes Art. 286<sup>28</sup> cannot be saved by cl. (6).

#### Restrictions 'in the interests of the general public'.

As to the meaning of their expression, see p. 81, *ante*.

9. *Bhaskaran v. State of Kerala*, A. 1958 Ker. 333 (334).

10. *Achuthan v. State of Kerala*, A. 1959 S.C. 490.

11. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (240).

12. *Secy. to Govt. v. A. G. Factory*, A. 1959 A.P. 538 (541; 544).

13. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

14. *Barada v. State of Assam*, A. 1956 Assam 23.

15. *Achutan v. State of Kerala*, A. 1959 S.C. 490.

16. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

17. *Vallinayagam v. State of Madras*, A. 1952 Mad. 528.

18. *State of Kerala v. Joseph*, A. 1958 S.C. 296.

19. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

20. *Himmatlal v. State of M. P.*, (1952-54) 2 C.C. 242; A. 1954 S.C.

The following are instances of restrictions imposed in the interests of the general public—

1. Restrictions imposed by the Imports and Exports (Control) Act, 1947 under the imperative necessity to control export and import trade for the economic stability of the country.<sup>21</sup>

2. A provision for the cancellation of a licence on the ground that it has been obtained by fraud (whether the licensee is a party to that fraud or not), after giving the licensee an opportunity of being heard.<sup>22</sup>

3. Restrictions imposed upon the sale of essential commodities to ensure their equitable distribution and availability at fair prices.<sup>23</sup>

4. Restrictions imposed by the Motor Vehicles Act upon the right to ply vehicles on public highways, for the conservation of roads, prevention of congestion and the like.<sup>24</sup>

5. Restrictions imposed on the right to carry on a profession, in the interest of purity in the public life, e.g., that a legal practitioner who is employed on behalf of or against a Municipality shall not be entitled to stand as a candidate for election as a Councillor of that Municipality.<sup>25</sup> Prohibition of tontism also comes under this category.<sup>1</sup>

6. Regulation laying down the conditions of and hours of employment in shops and commercial establishments,<sup>2</sup> even where no employee is engaged;<sup>3,4</sup> or fixing minimum wages in an industry.<sup>2</sup>

7. Restriction imposed upon cane-growers not to sell sugarcane to occupiers of factories, except through a Cane-growers' Co-operative Society, where the membership of such Society is not less than 75% of the total cane-growers within an area.<sup>5</sup>

### Reasonableness of restrictions.

#### (A) Substantive aspect.

#### 1. Instances of unreasonable restrictions.

1. S. 4 of the Central Provinces Regulation of Manufacture of Bidis Act (LXIV of 1948) empowered the Deputy Commissioner to prohibit the manufacture of *bidis* during the agricultural season in such villages as he might specify in his order. The object of the Act, as stated in its Preamble, was—"to provide measures for the supply of adequate labour for agricultural purposes in *bidhi* manufacturing areas." *Held*, that the above provision and the order of the Deputy Commissioner made thereunder (forbidding all persons residing in certain villages from engaging in the manufacture of *bidis*) were void being in contravention of Art. 19 (1)(g) of the Constitution. For, the object of the Act could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of *bidis* during the agricultural season or by regulating hours of work in the business of making *bidis*. A total prohibition of the manufacture imposes an unreasonable and excessive restriction of the lawful occupation of manufacturing *bidis*.

21. *Khader v. Subramania*, A. 1952 Mad. 840.

22. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240).

23. *Dwarkanprasad v. State of U. P.* (1952-54) 2 C.C. 221 (223); A. 1954 S.C. 224; *Narendra v. Union of India*, (1960) S.C.J. 214 (221).

24. *C. S. S. Motor Service v. State of Madras*, (1952) 2 M.L.J. 894.

25. *Sakhawan v. State of Orissa*, (1952-54) 2 C.C. 155; A. 1954 S.C. 166.

1. In the matter of Phool Din, A. 1952 All 491 (494).

2. *Matrumal v. Chief Inspector*, A. 1952 All. 773.

3. *Sadasivam v. State of Madras*, A. 1957 Mad. 144.

4. *Mangaraju v. Labour Inspector*, A. 1959 A. P. 604 (606).

5. *Bijay Cotton Mills v. State of Ajmer*, A. 1955 S.C. 33.

6. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (448).



The statute not only compels those who can be engaged in agricultural work from not taking to another avocation, viz., the manufacture of *bidis* but also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of *bidis* making and thus earning their livelihood; on the other, it prevents a manufacturer of *bidis* in the specified area from carrying on the business by importing labour from outside that area. No doubt, the regulation of employment of agricultural labour in the manufacture of *bidis* during the agricultural season is a restriction in the interest of the general public, but the language employed by the statute is wide enough to cover restrictions both within and without the limits of the constitutionally permissible legislative action affecting the right (See p. 23, ante). Hence, the impugned legislation is wholly void.<sup>7</sup>

2. Under section 8 of the Cinematograph Act, 1919, the District Magistrate imposed, *inter alia*, the following conditions in the licence granted to the Appellant, the owners of a cinema concern:

(a) The licensee should exhibit at each performance one or more of approved film of such length and for such length of time as the Provincial or Central Government may direct.

(b) The licensee should exhibit at the commencement of the performance not less than 2,000 feet of one or more approved films.

Held, that both the above conditions amounted to 'unreasonable' restrictions upon the fundamental right guaranteed to the Appellant under Art. 19 (1) (g), and were, accordingly, void. (a) The first condition gives an absolute and unfettered discretion to the Government without imposing any limitation as to the nature of the film or the duration of the time during which the licensee would be obliged to exhibit an 'approved film' nor does it offer any guide as to how the Government is to exercise its discretion. (b) The second condition is better in no way since it imposes the minimum length of the approved film to be exhibited but not the maximum. Hence, the discretion of the authority is as unfettered as in the case of condition (a).<sup>8</sup>

3. A law which leaves it entirely to the discretion of the Government to requisition the stocks of a commodity at any rate fixed by it and to dispose of such stock at any rate obviously constitutes an unreasonable restriction upon the owner's right under Art. 19 (1) (g).<sup>9</sup>

4. Gratuity is a reward for efficient and faithful service rendered for a considerable period, and is usually granted at retirement. There would be no justification for awarding gratuity when an employee voluntarily resigns except in exceptional circumstances. A law which imposes an obligation upon an employer to pay gratuity in every case of voluntary resignation from service is, therefore, unreasonable.<sup>10</sup>

## II. Instances of reasonable restrictions.

1. A temporary legislation to control production, supply and distribution of essential commodities during a period of emergency, cannot be said to be unreasonable.<sup>11</sup>

2. Marketing legislation which seeks to enable producers to get a fair price for the commodities by eliminating middlemen and providing a regulated market, cannot be said to impose unreasonable restrictions on the citizens' right to do business unless it is clearly

7. *Chintamanrao v. State of M. P.*, (1950-51) C.C. 64 : (1950) S.C.R. 759.

8. *Seshadri v. Dt. Magistrate*, (1952-54) C.C. 64.

9. *State of Rajasthan v. Nathmal*, (1954) S.C.R. 982 : (1952-54) 2 C.C. 239 : A. 1954 S.C. 307.

10. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (629).

11. *Harishankar v. State of M. P.* (1955) 1 S.C.R. 380 : (1952-4) 2 C.C. 510 (612).

established that the provisions are too drastic and overreach the object to achieve which it was enacted.<sup>12</sup>

3. Where the fixation of price of an *essential commodity* is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middlemen for whom it would be unprofitable to carry on business at the fixed rate.<sup>13</sup>

4. "The greatest good of the greatest number" has been taken as a ground for reasonableness in upholding the validity of a notification under the U. P. Sugarcane (Regulation of Supply & Purchase) Act, 1953, which provided that where not less than 75 per cent of the sugarcane growers of the area of operation of a Sugarcane Growers' Co-operative Society are members of the Society, the occupier of the factory for which the area is assigned shall not purchase or enter into an agreement for purchase of cane grown by a sugarcane grower, except through such co-operative society. The object of the restriction placed by the notification upon individual cane-growers to sell their produce to any person they liked, was to eliminate the unhealthy competition between the cane growers on the one hand and to prevent malpractices indulged by the occupier of a factory for the purposes of breaking up cane growers' co-operative society and the provision was reasonable because the condition of 75 per cent representation ensured that the restriction would be for the benefit of a large number of cane growers who formed the co-operative society.<sup>14</sup>

5. In the absence of *mala fides*, it is not unreasonable to restrict entry of new competitors in a business where it would result in unhealthy competition with the already existing concerns, which, itself, would have deleterious influence upon the general public.<sup>15</sup>

6. A law which prohibits the slaughter of bull, bullock (cattle as well as buffalo) cow and calf (cattle or buffalo), in pursuance of the Directive in Art. 48 of the Constitution in order to conserve the sources of milk-supply and draught cattle, constitutes a reasonable restriction, but a total ban on the slaughter of she-buffalos, bulls and bullocks (cattle or buffalo), *after they cease to be capable of yielding milk or of breeding or working as draught animals* cannot be supported as reasonable.<sup>16</sup>

7. The restrictions imposed by ss. 52A-52G of the Insurance Act, 1938 (as amended in 1950) on the business of an insurer for a limited period for the benefit of the general body of policy-holders, are reasonable and in the interests of the general public.<sup>17</sup>

8. A legislation which fixes a ceiling for personal cultivation with a view to the requirements for efficient agriculture, cannot be said to impose an unreasonable restriction upon the right of the owner to carry on his occupation as a tiller of the soil.<sup>18</sup>

9. A restriction imposed upon the carrying on of the trade of prostitution within a specified area is a reasonable one.<sup>19,20</sup>

10. A provision for cancellation of a licence on the ground that it was obtained by fraud.<sup>21a</sup>

12. *Arunachala v. State of Madras*, A. 1959 S.C. 300, reversing in part *Kutti v. State of Madras*, A. 1954 Mad. 621.

13. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

14. *Tika Ramji v. State of U. P.*, A. 1956 S.C. 676 (710).

15. *Valluayagam v. State of Madras*, A. 1952 Mad. 528.

16. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

17. *Jupiler General Ins. v. Rajagopalan*, A. 1952 Punj. 9 (18).

18. *Bhaura v. S. D. O.*, A. 1955 Nag. 1 (F.B.).

19. *Sona v. Municipality of Agra*, A. 1956 All. 736.

20. *Malerkotla v. Mushtaq*, A. 1959 Punj. 18 (20).

20a. *Fedco v. Bilgrami*, A. 1960 S.C. 415.



(B) *Procedural aspect.*

**I. Instances of reasonable restrictions.**

1. The restrictions imposed by the Imports and Exports (Control) Act, 1947 cannot be said to be 'unreasonable' inasmuch as it gave specific and reasonable instructions to officers and also provided for appeals to rectify the orders of subordinate officers.<sup>21</sup>

2. Where an appeal is provided from the decision of a Tribunal and it is obliged to act quasi-judicially, the reasonableness of the law cannot be challenged on the ground that it did not specifically provide for notice or for hearing.<sup>22</sup>

3. But judicial review of an administrative decision is not an essential condition of 'reasonableness' in all cases. Thus, the validity of the Minimum Wages Act, 1948 has been upheld on the ground that though there is no provision for judicial review of the decision of Government in the matter of fixing the minimum wages, Government acts with the advice of an Advisory Board which consists of an equal number of representatives of both the employers and employees engaged in the industries for which the wages are to be fixed. There is thus sufficient safeguard against arbitrary exercise by Government of its discretionary power and the restrictions cannot be held to be unreasonable.<sup>23</sup>

**II. Instances of unreasonable restrictions.**

1. The power of granting or withholding licenses or of fixing the prices of goods would necessarily have to be vested in certain public officers or bodies, and they would certainly have to be left with some amount of discretion in these matters. But a law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in *normally available commodities* cannot but be held to be unreasonable.<sup>24,25</sup>

2. A provision for cancellation of a licence (in respect of a trade which is not necessarily dangerous) without giving a reasonable opportunity to be heard against the proposed order, would be an 'unreasonable restriction' (see p. 113, *post*).

3. But discretionary power cannot be held to be arbitrary where the policy according to which the discretion is to be exercised is provided by the law.<sup>2</sup>

**Whether 'restriction' includes prohibition.**

1. As has been already pointed out, the question whether 'reasonable restrictions' could include total prohibition cannot be answered categorically. It depends on the nature of the mischief which the Legislature seeks to remedy.

2. Thus, where a business or trade is inherently dangerous,<sup>26</sup> total prohibition thereof would be reasonable.

21. *Khader v. Subramania*, A. 1952 Mad. 840.

22. *Chaturbhai v. Union of India*, (1960) S.C.J. 224.

23. *Bijoy Cotton Mills v. State of Ajmer*, (1952-54) 2 C.C. 264 : A. 1955 S.C. 33.

24. *Dwarka Prasad v. State of U. P.*, (1952-54) 2 C.C. 221 : A. 1954 S.C. 224.

25. *Seshadri v. Dt. Magistrate*, (1955) 1 S.C.R. 686 : A. 1954 S.C. 747.

1. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240) : A. 1960 S.C. 415.

2. *Harishankar v. State of M. P.*, (1955) 1 S.C.R. 380 : A. 1954 S.C. 465.

3. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873 : (1952-4) 2 C.C. 227 (229) : A. 1954 S.C. 220.

4. *C. S. S. Motor Services v. State of Madras*, (1950) 2 M.L.J. 894 (910).

Thus—

(i) As the business of making or selling intoxicant liquors is attended with danger to the community, it may be entirely prohibited, or permitted under such conditions as will limit to the utmost its evils.<sup>5</sup>

(ii) Similarly, trading in dangerous goods such as explosives<sup>6</sup> or trafficking in women<sup>7</sup> or toutism<sup>8</sup> may be totally prohibited.

(iii) The same principle has been applied to trading in *essential commodities*.<sup>9,10</sup>

3. But outside the above exceptional categories, a total prohibition of the right to carry on a business would be regarded as an 'unreasonable' restriction,<sup>11</sup> and, "greater the restriction, the more the need for strict scrutiny by the Courts."<sup>12</sup>

### Permits and licences in relation to the freedom of business.

(A) (1) In the absence of exceptional circumstances, the exercise of no fundamental right guaranteed by the Constitution can be made to depend upon the absolute discretion of an administrative authority.<sup>13</sup> If, therefore, a law confers power on an administrative authority absolute discretion to grant or withhold or revoke<sup>14</sup> a permit for the carrying on of a business, the restriction imposed by such law is 'unreasonable', except in the case of trade or business which is inherently dangerous<sup>15</sup> to the community and which the State is entitled either to prohibit entirely, or to permit only under such conditions as will limit to the utmost its evils,<sup>16</sup> or in a time of emergency,<sup>17</sup> when it is necessary to impose control on the production, supply and distribution of commodities essential to the life of the community.<sup>18</sup>

2. The discretion vested by a statute cannot be said to be absolute and unregulated if the statute lays down the policy according to which the discretion is to be exercised.<sup>19</sup> If the authority exercises the discretion otherwise than in accordance with the statutory policy, his order would be vitiated by abuse of power and would be liable to be set aside by a court of law as *ultra vires*.<sup>20</sup>

3. An existing permit cannot be cancelled or revoked without giving an opportunity to the licensee to be heard,<sup>21,22</sup> except in the case of inherently dangerous trades or callings which a person has no common law right to carry on.<sup>23</sup>

(B) 1. The power to make *licensing* regulations is, however, to be distinguished from a permit system. The State has, in the interests of the public, the right to lay down reasonable conditions subject to which a business may be carried on, and if power is conferred by the Legislature upon an administrative authority to proceed to grant or refuse the licence, not in an arbitrary manner but in a quasi-judicial manner,

5. *Allahnoor v. D. M.*, A. 1956 Raj. 153; *In re Sundara*, A. 1953 Mad. 142.

6. *In the matter of Phool Din*, A. 1952 All. 491.

7. *M. B. Cotton Association v. Union of India*, A. 1954 S.C. 634.

8. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

9. *Chitamanrao v. State of M.P.*, (1950) S.C.R. 759.

10. *State of Madras v. V. G. Row*, (1952) S.C.R. 597 (608) : A. 1952 S.C. 196.

11. *Ganapali v. State of Ajmer*, (1955) 1 S.C.R. 1065 : A. 1955 S.C. 185 (190).

12. *Harishankar v. State of M. P.* (1955) 1 S.C.R. 380 : (1952-4) 2 C.C. 510 (512) : A. 1954 S.C. 465.

13. *Rameshwar v. Dt. Magistrate*, A. 1954 All. 144.

14. *Jakhar v. Govt. of Rajasthan*, A. 1959 Raj. 220 (222).

15. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240).

16. *Shivaji v. Union of India*, A. 1959 Punj. 510 (514).



having regard to the conditions laid down by the Legislature, the restrictions cannot be said to be unreasonable.<sup>17</sup>

2. On the other hand,—

(a) If the statute does not lay down the principles for the guidance of the licensing authority in the matter of granting or refusing licence, it would constitute an unreasonable restriction upon the freedom of business.<sup>17a</sup>

(b) The conditions imposed by a licence must not be so excessive or arbitrary as to lead to an extinction of the business of the licensee and thus amount to a deprivation of the fundamental right to carry on the business.<sup>18</sup>

(c) An existing licence cannot be revoked without giving an opportunity to the licensee to be heard.<sup>19,20</sup>

(d) As regards the grant of a licence, the question arises whether a person is entitled as of right to a licence even though he complies with the conditions laid down by the law :

In connection with s. 42 of the Motor Vehicles Act, the Supreme Court observed<sup>21</sup> that the function of granting a permit under the Act is administrative and entirely within the discretion of the Transport Authority.

But, as pointed out by the Allahabad High Court,<sup>22</sup> the question was not considered in the Supreme Court decision with reference to Art. 19 (1) (g) of the Constitution. According to this view the granting of a licence with respect to a trade which is not inherently dangerous<sup>23</sup> cannot be regarded merely as a privilege. A citizen has the right to carry on such trade subject to such restrictions as may be imposed by the State, provided they are reasonable; and a law which empowers an administrative authority to refuse a licence, at his discretion, even though the applicant has complied with the conditions specified in the statute must be regarded as unreasonable. The power to decide whether the statutory conditions have been fulfilled must necessarily be given to that authority<sup>24</sup>, and this discretion is wider where (as in s. 47 of the Motor Vehicles Act) the authority is empowered to take into account certain administrative considerations, apart from certain specified conditions,—such as objections from a police or other local authority.<sup>25</sup> But, apart from this, if the licensing authority is guided by considerations extraneous to the statute, his action would be *ultra vires*.<sup>1</sup>

#### Cl. (6) (i): Professional or technical qualifications.

It is not an unreasonable restriction upon the freedom of business to provide that a party must prove his solvency by producing income-

17. *Ananthakrishna v. State of Madras*, (1952) 1 M.L.J. 208.

17a. *Panna Lal v. Union of India*, A. 1957 S.C. 397 (410).

18. *Sheshadri v. Dt. Magistrate*, (1955) 1 S.C.R. 686; A. 1954 S.C. 747.

19. *Jakhar v. Govt. of Rajasthan*, A. 1959 Raj. 220 (222).

20. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240) : A. 1960 S.C. 415.

21. *Veerappa v. Raman*, (1952) S.C.R. 583 (595).

22. *Iqbal v. Municipal Board*, A. 1959 All. 186 (189).

23. Cf. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873.

24. Cf. *Dwarka Prasad v. State of U.P.*, (1954) S.C.R. 803 (811).

25. The observations of the Supreme Court in *Verappa v. Raman*, (1952) S.C.R. 583 appear to have been made in view of the above provisions in the statute.

1. Cf. *R. K. V. Motors v. R. T. A.*, A. 1960 Ker. 35 (37); *Shridhar v. R. T. A.*, A. 1959 Mys. 120 (122); *Iqbal v. Municipal Board*, A. 1959 All. 186; also see *Sheriff v. S.T.A.*, (1960) S.C.J. 402.

tax clearance certificate for the purpose of being eligible for a Government contract<sup>2</sup> or an import licence.<sup>3</sup>

### Cl. 6(ii): Trading by the State.

Since Art. 19 (1) (g) declares that every citizen has the right to carry on any trade or business, the right would obviously be impaired if the State itself seeks to carry on a trade or business ousting private traders from that trade, wholly or partially. Hence, under the original cl. (6), such action on the part of the State could be justified only if it was *reasonable*.

The Amendment of 1951 exempts the State from that condition of reasonableness, by laying down that the carrying on of any trade, business, industry or service by the State would not be questionable on the ground that it is an infringement of the right guaranteed by Art. 19 (1) (g). Hence, the State shall now be free either to compete with any private traders or to create a monopoly in favour of itself without being called upon to justify its action in Court as 'reasonable'.<sup>4</sup>

The State may enter into a trade or industry causing a partial or complete elimination of private traders, not only for reasons of administrative policy, e.g., manufacture of salt or alcohol; or for mitigating the evils arising from the competitive system, e.g., for the better control of prices or quality of products, or for the administration of public utility services, but also simply for the making of profit just as a private trader would do, e.g., carrying on the business of motor transport.<sup>5-8</sup> There is no infringement of the right guaranteed by Art. 19 (1) (g) where the State enters a trade merely as a competitor.<sup>9</sup> In view of this amendment, a challenge on the ground of contravention of Art. 14 is also of no avail.<sup>7</sup>

The Amendment thus envisages the nationalisation of business or trade.<sup>9</sup>

**Amendment of Cl. (6), not retrospective.**—The amendment of cl. (6) by the Constitution (First Amendment) Act, 1951 has been held not to be retrospective and, accordingly, not to affect laws made prior to 18-6-51.<sup>4</sup>

**Whether legislation is necessary for the carrying on of trade by the State.**

It has been ruled by the Supreme Court that the State is competent to enter into any trade or business like a private individual without a specific legislation sanctioning such activity. Specific legislation would be necessary only if the Government requires some power which they do not already possess under the law,<sup>9</sup> e.g., when the State seeks to create a monopoly in its favour, to the exclusion of the citizen whose right to carry on the trade is guaranteed by the Constitution.<sup>9</sup>

**Whether the State can create a monopoly right in favour of a particular individual or individuals.**

While the amendment of cl. (6) by the Constitution (First Amend-

2. *C. S. S. Motor Services v. State of Madras*, (1952) 2 M.L.J. 894 (907).

3. *Dasal v. Dy Chief Controller*, A. 1955 Mad. 699.

4. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707 : (1952-4) 2 C.C. 248 (257).

5. *Cf. Ramchandra v. State of Orissa*, (1956) S.C.R. 28.

6. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225.

7. *P. T. C. S. v. R. T. A.*, (1960) S.C. [Petn. 110/59].

8. *Naib Transport v. Mukherji*, A. 1958 Cal. 652.

9. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (238).



ment) Act, 1951 precludes the Court from questioning the reasonableness of a law which creates a monopoly in favour of the State itself or of a corporation owned or controlled by the State, to carry on a trade to the exclusion of the citizens,—where such a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of the restriction imposed in the latter case may be questioned by the Court, for, the amendment of cl. (6) does not apply to such a case.

2. In such a case, the reasonableness has to be determined with reference to the circumstances relating to the trade or business in question. Thus,—

(a) There are certain trades which are so inherently dangerous (e.g., the business relating to intoxicating liquor) that the State cannot, without danger to the society, allow normal trading by all persons. In such cases, the creation of a monopoly right in favour of an individual or individuals for the purpose of effective State control might be reasonable.<sup>10</sup>

(b) But where there is nothing innocuous in the nature of the business itself, e.g., the business of selling vegetables,<sup>11</sup> the prohibition of normal trading by all persons and the granting of a monopoly right to a particular individual cannot be held to be reasonable.

3. Even though a monopoly is not granted to any particular trader and there is no express prohibition against the carrying on of the business by anybody, there is an unreasonable restriction on the freedom of business if the effect of a Municipal bye-law, charging a licence fee, is to bring about a total stoppage of a business in the commercial sense.<sup>12</sup>

#### Illustration.

At Jalalabad, the vegetable growers used to bring their produce to the town and get them auctioned through a dealer of their choice who charged them a commission of one anna in the rupee. The Town Area Committee made certain bye-laws, by which the right to levy and collect commission on sale and purchase of vegetable was vested in the Committee or an agency appointed by the Committee. The Committee then auctioned this right in favour of a contractor B. The Committee, by other bye-laws, provided that nobody could sell vegetables in wholesale without payment of a prescribed licence fee to the contractor. Held, the bye-laws, in effect, brought about a total stoppage of the wholesale business in vegetables, in the commercial sense. For, the wholesale dealers, who will have to pay the prescribed fee to the contractor, will necessarily have to charge the growers of vegetables something over and above the prescribed fee so as to keep a margin of profit for themselves, but in such circumstances, no grower of vegetables will have the produce sold to or auctioned by the wholesale dealers at a higher rate of commission but all of them will flock to the contractor who will only charge them the prescribed commission.<sup>13</sup>

#### Art. 19 (1) (g) and laws of taxation.

Though the reasonableness of a 'tax' or the procedure for its assessment or collection<sup>14</sup> cannot generally be challenged,<sup>15</sup> a 'licence fee'<sup>16</sup>

10. *Cooverjee v. Excise Commissioner*, (1954) S.C.R. 783 : (1952-4) C.C. 227 : A. 1954 S.C. 220.

11. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 568 : (1950-51) C.C. 61.

12. *Yasin v. Town Area Committee*, A. 1952 S.C. 115 : (1952) S.C.R. 572.

13. *Hirabhai v. State of Bombay*, A. 1955 Bom. 185 (192).

or a profession tax<sup>15</sup> which operates as a restriction upon the right to carry on a business, can be challenged, under Art. 19 (5).<sup>16</sup>

Thus, if the total amount that would be collected from a licence fee be disproportionately high in comparison with the expenditure incurred by the Government in connection with the business in question, the licence fee would be an 'unreasonable' restriction upon the right guaranteed by Art. 19 (1) (g) of the Constitution.<sup>16</sup>

It is, however, not necessary to show that every pie of the fee realised goes towards maintenance of the service for which the fee is realised. Once it is shown that the fee is co-related to a service which is within the competence of the State to provide, it is for the person who challenges the reasonableness of the levy to show that the money realised is not utilised for the maintenance of the service.<sup>17</sup>

**Arts. 19(1) (g) and 301.**—See under Art. 301, *post*.

**Constitutionality of some Acts with reference to Art. 19(1) (g).**

**Banking Companies Act, 1949:**

*Held valid.*—S. 22.<sup>18</sup>

**Bihar Preservation and Improvement of Animals Act, 1956:**

*Held.*—Partly valid and partly invalid.<sup>19</sup>

**Bihar Wakfs Act, 1948:**

*Held valid.*—S. 58.<sup>20</sup>

**Bombay Lotteries & Prize Competitions Act, 1948:**

*Held valid.*—Whole Act.<sup>21</sup>

**Calcutta Police Act, 1866:**

*Held valid.*—S. 39.<sup>22</sup>

**C. P. & Berar Animal Preservation Act, 1949:**

*Held.*—Partly valid and partly invalid.<sup>23</sup>

**Central Provinces & Berar Regulation of Manufacture of Bidis Act, 1948:**

*Held void.*—S. 4.<sup>24</sup>

**Electricity Act, 1910:**

*Held valid.*—S. 28 (1).<sup>25</sup>

**Essential Commodities Act, 1955:**

*Held valid.*—Ss. 3 (2), (3).<sup>1</sup>

**Import Control Order, 1955:**

*Held valid.*—Cl. 9 (a).<sup>2</sup>

**Income Tax Act, 1922:**

*Held valid.*—Ss. 5 (7A).<sup>3</sup>

14. *Alma Ram v. State of Bihar*, A. 1953 Pat. 359.

15. *Ananthakrishnan v. State of Madras*, A. 1952 Mad. 395.

16. *Varadachari v. State of Madras*, A. 1952 Mad. 764.

17. *Haralal v. Dibrugarh Municipality*, A. 1958 Assam 156.

18. *Saffan v. Reserve Bank of India*, (1959) 2 M.L.J. 455.

19. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

20. *Bashiruddin v. State of Bihar*, (1957) S.C.R. 1032.

21. *State of Bombay v. Chamarbaugwalla*, (1957) S.C.R. 874.

22. *Kishanchand v. Commr. of Police*, (1958) 62 C.W.N. 799; A. 1959 Cal. 123.

23. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

24. *Chintamanrao v. State of M. P.*, (1950) S.C.R. 759.

25. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

1. *Thanmal v. Union of India*, A. 1959 Raj. 206.

2. *Fedco v. Bilgrami*, (1960) S.C.J. 235 (240); A. 1960 S.C. 415.

3. *Pannalal v. Union of India*, (1957) S.C.R. 233 (262).



**Industrial Disputes Act, 1947:***Held valid.*—S. 10.<sup>4</sup>**Madras Commercial Crops Market Act, 1933:***Held valid.*—Entire Act.<sup>5</sup>**Minimum Wages Act, 1948:***Held valid.*—Whole Act.<sup>6</sup>**Motor Vehicles Act, 1939:***Held valid.*—Ch. IVA'; Ss. 42,<sup>7</sup> 43A,<sup>8</sup> 47,<sup>9</sup> 48,<sup>9</sup> 64A.<sup>9</sup>**Non-Ferrous Metal Control Order, 1958:***Held valid.*—Cls. 3,<sup>10</sup> 4.<sup>9</sup>**Sugar Export Promotion Act, 1958:***Held valid.*—Whole Act.<sup>11</sup>**U. P. Prevention of Cow Slaughter Act, 1956:***Held.*—Partly valid and partly invalid.<sup>12</sup>**Working Journalists Act, 1955:***Held invalid.*—S. 5 (1) (a) (iii).<sup>12</sup>*Held valid.*—The rest of the Act.<sup>12</sup>

**20. (1)** No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Protection in respect of conviction for offences.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

**Cl. (1): Prohibition against retrospective criminal law.**

A sovereign Legislature has the power to enact prospective as well as *retrospective* laws (see, further, under Art. 245, *post*). But the present Article sets two limitations upon the law-making power of every legislative authority in India as regards retroactive criminal legislation. It prohibits—(i) the making of *ex post facto* criminal law, i.e. making an act crime for the first time and then making that law retrospective; (ii) infliction of a penalty greater than that which might have been inflicted under the law which was in force when that act was committed.<sup>13</sup>

4. *Niemla Textile Mills v. Punjab Industrial Tribunal*, (1957) S.C.R. 335 (352): A. 1957 S.C. 329.

5. *Arunachala v. State of Madras*, A. 1958 S.C. 300 (reversing in part A. 1954 Mad. 621).

6. *B. C. Mills v. State of Ajmer*, (1955) 1 S.C.R. 752.

7. *Nageswara v. Andhra Pradesh S. R. T. C.*, A. 1959 S.C. 308 (316).

8. *Raman & Raman v. State of Madras*, A. 1959 S.C. 695 (700).

9. *Narendra v. Union of India*, (1960) S.C.J. 214 (222).

10. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1132).

11. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

12. *Express Newspaper v. Union of India*, A. 1958 S.C. 578.

13. *Prahlad v. State of Bombay*, A. 1952 Bom. 1.

**'Shall be convicted'.**

1. What is prohibited under cl. (1) is only conviction or sentence under an *ex post facto* law and not the trial thereof. Hence, trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at that time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.<sup>14</sup> In short, the prohibition under this clause does not extend to merely *procedural* laws.<sup>14</sup>

2. The prohibition is only against prescribing judicial punishment with retrospective effect. It does not prohibit the enforcement of any other sanction, e.g., the loss or deprivation of any business or forfeiture of property<sup>15</sup> or cancellation of naturalisation certificate by reason of act committed prior to the operation of the penal law in question.

3. The words 'convicted' and 'offence' make it clear that the Article has no application to preventive detention,<sup>16</sup> or an order of extenuation.<sup>17</sup>

4. On the other hand, the prohibition under the present clause is not confined to the passing or the validity of the law, but extends to the conviction or the sentence based on its character as an *ex post facto* law. The clause, therefore, must be taken to prohibit all convictions or subjections to penalty which take place after the commencement of the Constitution in respect of an *ex post facto* law whether the same was a *post-Constitution* or a *pre-Constitution* law.<sup>18</sup>

**'Law in force'.**

1. This expression refers to the law *factually in operation* at the time when the offence was committed and does not relate to a law 'deemed to be in force' by the retrospective operation of a law subsequently made.<sup>19,20</sup> Art. 20 (1), in fact, controls the power of the Legislature to enact such retrospective legislation so far as the punishment for crimes is concerned.

2. The law for the violation of which a person is sought to be convicted must 'have been' in force at the time when the act with which he is charged was committed. It follows, therefore, that a person cannot be convicted for an act which was *not an offence* under the law which was in force when that act was committed.<sup>20,21</sup>

3. Rules and regulations made under a statute which is repealed but continued in force under s. 24 of the General Clauses Act is a 'law in force' within the meaning of Art. 20 (1).<sup>22</sup>

**'Penalty greater than that which might have been inflicted'.**

1. These words lay down the second prohibition contained in the clause. A person may be subjected to only those penalties which were

14. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 118 : (1952-4) 2 C.C. 269 (272) : A. 1953 S.C. 394.

15. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (S.B.).

16. *Prahlad v. State of Bombay*, A. 1952 Bom. 1.

17. *Rameschandra v. State*, A. 1955 Bom. 346.

18. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188 : (1952-4) 2 C.C. 269 (271) : A. 1953 S.C. 394.

19. *Ramashankar v. State*, A. 1954 All. 562.

20. *Pulin v. Satyaranjan*, A. 1953 Cal. 599.

21. *Randhira v. The State*, A. 1954 M.B. 83.

22. *Ram Rattan v. State*, A. 1959 Punj. 69.



prescribed by the law which was in force at the time when he committed the offence for which he is being punished. If an additional<sup>23</sup> or higher<sup>24</sup> penalty is prescribed by any law made subsequent to the commission of the offence, that will not operate against him in respect of the offence in question.

2. But the Article does not prohibit the substitution of a penalty which is not higher or greater than the previous one.<sup>25</sup>

3. Forfeiture of property for a statutory offence is a 'penalty' within the meaning of the present clause,<sup>1</sup> but it is not 'conviction' under the earlier part of the Articles.<sup>2</sup>

4. 'Penalty', however, means *punishment* for the offence and would not include any other remedial measure provided for removing the mischief, e.g., summary eviction of a landlord who has contravened the provisions of a Rent Control law,<sup>3a</sup> or the civil liability to pay an enhanced water rate in case of an unauthorised use of water.<sup>4</sup>

### Cl. (2): Immunity from double punishment.

This clause guarantees that no person shall be prosecuted and punished for the same offence more than once. 'And' is used here in the ordinary conjunctive sense.<sup>5</sup> Hence, Art. 20 (2) bars a second prosecution only where the accused has been both *prosecuted and punished* for the same offence previously.<sup>6</sup>

### Conditions for the application of Cl. (2).

1. The conditions for the application of this clause are—

(a) The person must have been 'prosecuted' in the previous proceeding.

(b) He must have been 'punished' in the previous proceeding.

(c) The 'offence' which is the subject-matter of the second proceeding must be the same as that of the first proceeding, for which he was 'prosecuted and punished'.

(d) The 'offence' must be an offence as defined in s. 3 (38) of the General Clauses Act,<sup>7</sup> that is to say, 'an act or omission made punishable by any law for the time being in force'. It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.<sup>8</sup>

(e) The second proceeding must be a proceeding where he is, for the second time, sought to be 'prosecuted and punished' for the same offence. Hence, the clause has no application where the subsequent proceeding is a mere continuation of the previous proceeding, e.g., in the case of an appeal against acquittal.<sup>9</sup> In other words, a second punishment for the same offence does not attract the operation of the

23. *Kedar Nath Bajoria v. State of West Bengal*, (1953) S.C.A. 835 (852); (1954) S.C.R. 30.

24. *Mohari Lall v. Corporation of Calcutta*, A. 1953 Cal. 561.

25. *Public Prosecutor v. Ayyapan*, A. 1953 Mad. 837.

1. *Hurdul v. State of Bihar*, A. 1957 Pat. 1 (3).

2. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1.

2a. *Fathima v. State of Madras*, A. 1953 Mad. 257.

3. *Mukundi v. Executive Engineer*, A. 1956 Pepsu 40 (46).

4. *Venkataraman v. Union of India*, (1954) S.C.R. 1150 : (1952-4) 2 C.C. 296 (298).

5. *Pulin v. Satyaranjan*, A. 1953 Cal. 589.

6. *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1958 Cal. 682.

7. *Venkataraman v. Union of India*, (1954) S.C.R. 1150 : A. 1954 S.C. 375.

8. *Kalawati v. State of H. P.*, (1953) S.C.R. 546.

clause unless the second punishment is awarded in a *fresh proceeding*. Thus, to provide that a person who would be convicted of an offence shall not only be punished under the law but also be removed from the country, does not offend against the guarantee offered by the present clause.

2. The bar provided by this clause does not apply unless all the above conditions are satisfied.<sup>7, 8, 10</sup>

For instance even if proceedings have been taken for an 'offence', Art. 20 (2) will not be attracted if the proceedings do not constitute a 'prosecution'.<sup>10</sup>

### 'Prosecuted and punished'.

1. These words indicate that both the proceedings referred to by the clause must be proceedings before a *Court of law or a judicial tribunal*.<sup>9</sup>

2. 'Prosecution' in this context, thus, means an initiation or starting of proceedings of a criminal nature before a Court of law<sup>10</sup> or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the punishment.<sup>7</sup> Hence, the following proceedings do not constitute prosecution within the meaning of Art. 20 (2)—

Proceedings for the confiscation of goods under s. 167 (8), Sea Customs Act, 1878,<sup>11</sup> even though in awarding the penalty, the Collector is under a duty to act quasi-judicially.<sup>10, 11</sup>

3. Where the previous prosecution was *null and void*.—e.g., for absence of proper sanction,<sup>12</sup> or for want of jurisdiction of Court,<sup>13</sup> a fresh trial upon the same facts would not be barred, even though the accused might have served out a part of his sentence before he could obtain his acquittal on appeal, on the ground of want of sanction or jurisdiction.<sup>14</sup>

4. Similarly, where there was no punishment in the previous proceeding, e.g., owing to dismissal for default of the complainant,<sup>15</sup> a fresh prosecution would be barred. Where a conviction is set aside and a retrial ordered, the retrial is a continuation of the same proceedings and not a second prosecution.<sup>14</sup>

### 'Punishment'.

'Punishment' in this clause means a judicial penalty and would not include other penalties, such as disciplinary action in the case of public servants<sup>17</sup> (including penalty imposed under s. 22 of the Public Servants (Inquiries) Act, 1850<sup>18</sup>); or action against a lawyer under the Legal Practitioner Act;<sup>19</sup> or penalties for *fail offences* under disciplinary rules of jail<sup>14</sup> or under the Prisons Act;<sup>14, 20</sup> or penalties under s. 167 (8)

9. *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730 : A. 1953 S.C. 325.

10. *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375 (383).

11. *Sewpujanrai v. Collector of Customs*, A. 1958 S.C. 845.

12. *Baljnath v. State of Bhopal*, (1957) S.C.R. 650.

13. *Upendra v. State*, A. 1954 Assam 106.

14. *Dattu v. Odya*, A. 1956 Hyd. 127.

15. *Ram Ghel v. Ram Kishan*, A. 1952 All. 642.

16. *Mithallal v. State*, A. 1954 All. 689.

17. *Suresh v. Himangshu*, (1951) 55 C.W.N. 605 (611).

18. *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730 (748) : A. 1953 S.C. 325.

19. *Re Devanugraham*, A. 1952 Mad. 725.

20. *Prithish v. The State*, A. 1952 Cal. 319.



of the Sea Customs Act, 1878;<sup>21</sup> or penalties prescribed by Rules of a Legislature for breach of privilege;<sup>22</sup> or removal under the Influx from Pakistan (Control) Act;<sup>23</sup> or binding down for good behaviour under s. 110<sup>24</sup> or taking security under s. 107 of the Criminal Procedure Code.<sup>25</sup>

### 'Same offence'.

The previous conviction for one offence (e.g. hurt) does not bar a subsequent trial and conviction for a separate offence (say, affray) even though the two offences arise out of the same.<sup>26</sup> The same principle has been applied to other sets of distinct offences—

- (a) Possession of firearms without licence and dacoity.<sup>27</sup>
- (b) Offence under s. 353 I.P.C. and under s. 26 (1) (b), Bihar Sales Tax Act.<sup>28</sup>
- (c) An offence and the offence of conspiracy to commit that offence.<sup>29</sup>

### 'More than once'.

As has been pointed out already, there is no double punishment to attract the operation of the present clause unless there is a fresh judicial proceeding for the same offence. Hence, the clause is not attracted—

- (i) Where the sentence provides for imprisonment in default of payment of the fine awarded.<sup>30</sup>
- (ii) Where the sentence is for fine and also for recovery of arrears of sales tax as if it were a fine.<sup>31</sup>

**Cl. (3): Accused's immunity from being compelled to be a witness against himself.**

This clause gives protection—

- (i) to a person 'accused of an offence';
- (ii) against compulsion "to be a witness";
- (iii) against himself.<sup>32</sup>

### 'Person'.

The Supreme Court assumed that the protection offered by this clause extended to corporations.<sup>33</sup>

### 'Accused of an offence'.

1. These words indicate that the protection of this clause is confined to criminal proceedings or proceedings of that nature before a Court of law,<sup>34</sup> or other Tribunal before whom a person may be accused of an 'offence' as defined in s. 3 (38) of the General Clauses Act.<sup>35</sup>

21. *Raj Narain v. Altmaram*, A. 1954 All. 319 (334, 339).

22. *Ebrahim Vazir v. State of Bombay*, A. 1954 S.C. 229 (232).

23. *Arumugham v. State of Madras*, A. 1953 Mad. 664 (668).

24. *Subeg v. Emp.*, A. 1942 Lah. 84.

25. *Kariappa v. Somanna*, A. 1955 Mys. 138.

1. *Ishodanand v. State*, A. 1955 Pat. 396.

2. *Shyamal v. State*, A. 1954 Pat. 247.

3. *Leo Roy v. Supdt. Dt. Jail*, A. 1958 S.C. 119.

4. *Loomchand v. Official Liquidator*, A. 1953 Mad. 595.

5. *Ramadoss, in re*, A. 1958 A.P. 707.

6. *Sharma v. Satish*, (1954) S.C.R. 1077: (1952-4) C.C. 288 (291).

7. *Magbool v. State of Bombay*, A. 1953 S.C. 325: (1953) S.C.R. 730.

8. *Collector of Customs v. Calculla Motor & Cycle Co.*, A. 1958

Cal. 682 [contra *Shankarlal v. Collector of Customs*, (1959) 2 M.L.J. 68n; *State v. Devi Dosa*, (1959) 62 Bom. L.R. 316].

It would not, therefore, extend to parties and witnesses in civil proceedings<sup>9</sup> or proceedings other than criminal<sup>10</sup>, e.g., a proceeding for public examination of a director etc. under s. 45G of the Banking Companies Act, 1949,<sup>11</sup> or s. 240 of the Companies Act, 1956.<sup>12</sup>

In such proceedings, a person cannot refuse to give an answer on the plea that it might tend to subject him to a criminal prosecution at a future date.<sup>13</sup> Herein, the scope of the present clause is narrower than the corresponding American provision.<sup>14</sup>

2. On the other hand, the use of the word 'offence', as defined in s. 3 (38) of the General Clauses Act, would include proceedings for punishment for any act or omission which is punishable under any law in force, e.g., under s. 171A of the Sea Customs Act, 1878, which provides for the imposition of a monetary penalty or forfeiture for the breach of some of its provisions.<sup>15</sup>

3. Again the protection is available to a person accused of an offence not merely with respect to the evidence to be given in the court room in the course of the trial but it is also available to him at the previous stages if an accusation has been made against him which might in the normal course result in his prosecution.<sup>11,12</sup>

#### Illustration.

Where in a notice issued under s. 171A of the Sea Customs Act, accusations of offences for which criminal proceedings could be brought were included, the persons against whom the notices were issued were entitled to a writ of mandamus against the notice in so far as it called upon such persons to give evidence or to produce such documents as might incriminate them.<sup>12</sup>

4. The clause does not require 'formal' accusation by the issue of a process by the Court. The immunity would commence from the moment a person is named in the First Information Report,<sup>11</sup> or a complaint which would in the normal course result in prosecution.

If a person has been named, by officials who are competent, to launch a prosecution against him, as having committed an offence, he is accused of an offence within the meaning of this clause.<sup>12</sup>

But the naming of a person in the First Information Report is not an essential condition of being 'accused' within the meaning of this clause. Where evidence, whether oral or circumstantial, points to the guilt of a person and he is taken into custody and interrogated on that basis, he becomes a person 'accused of an offence' and any self-incriminatory statement made by him is inadmissible by him at a subsequent trial, if it was obtained under compulsion.<sup>13</sup>

#### 'Compelled'.

1. Compulsion is an essential ingredient of the clause. The clause does not, accordingly, prohibit the admission of confession which is made without any inducement, threat or promise, even though it may be subsequently retracted.<sup>14</sup>

9. *Suryanarayana v. Vijaya Commercial Bank*, A. 1958 A.P. 756 (759).

9a. *State v. Devi Dosa*, (1959) 62 Bom. L.R. 316 (320).

10. *Narayanlal v. Maneck*, A. 1959 Bom. 320 (330). [But the Punjab High Court has held [*Allen Berry v. Vivian Bose*, A. 1960 Panj. 86] that Art. 20 (3) shall be attracted to such proceedings if the evidence given in the proceedings may normally result in a prosecution].

11. *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1958 Cal. 682.

12. *Sharma v. Satish*, (1954) S.C.R. 1077 : A. 1954 S.C. 300.

13. *Amin v. State*, A. 1958 A.J. 293 (302).

14. *Kalawati v. State of H. P.*, (1953) S.C.R. 546.



2. The validity of s. 342 of the Cr. P. C. has been upheld on the ground that the accused is not bound to answer the question put to him under this section.<sup>15</sup>

3. When under the provisions of any law a person is, under a legal sanction, bound to give oral or documentary evidence, it is obvious that he is 'compelled to be a witness'.<sup>16</sup>

#### 'To be witness'.

1. It has been pointed out by the Supreme Court that the expression used in the clause is 'to be' and not 'to appear' as a witness. It follows, therefore, that the immunity given by the clause extends to immunity against being compelled to furnish any kind of evidence which is reasonably likely to support a prosecution against him.<sup>17</sup>

2. The word 'witness' also includes the accused himself and any person against whom a formal accusation has been made, e.g., by recording a First Information Report.<sup>18</sup> It also extends to any pre-trial evidence which may in the normal course result in the prosecution of the person from whom such evidence is obtained by compulsion.<sup>19</sup> The guarantee, in short, is not confined to immunity from testimonial compulsion within the Court room.<sup>20</sup>

#### Coerced confession leading to discovery of fact: S. 27 of the Evidence Act.

1. Information given to the Police is obviously pre-trial evidence within the purview of the dictum of the Supreme Court in *Sharma v. Satish*.<sup>19</sup> Hence, if such information is obtained by compulsion, it must be excluded from evidence in view of Art. 20 (3).<sup>18, 22</sup>

2. The fact of compulsion will, of course, have to be proved by evidence and will not be presumed from the mere fact that the information was given while the accused was in the custody of a Police officer.<sup>21, 22</sup>

#### The immunity extends to production of documentary evidence.

1. The word 'witness' in the present clause has been interpreted by our Supreme Court<sup>18</sup> in the American way, so as to include not only oral but also documentary evidence. The result is that a compulsory process for the production of evidentiary documents against a person who has been accused of an offence contravenes Art. 20 (3) of the Constitution, if the documents are reasonably likely to support the prosecution against such person.<sup>16</sup>

2. It is to be noted, at the same time, that the Court held that there is nothing unconstitutional in s. 96 of the Cr. P. Code which provides for 'search and seizure' of documents on failure to produce documents in compliance with a summons for production under s. 94 of the Code, on the ground that there is no prohibition in our Constitution against unreasonable search and seizure.<sup>18</sup>

3. As regards the constitutionality of s. 94 itself, though the Supreme Court left the question open, once it is held that Art. 20 (3) would "extend to any compulsory process for production of evidentiary documents which are reasonably likely to support of prosecution against

15. *Govinda Reddy, in re*, A. 1958 Mys. 150; *Banswarilal v. State*, A. 1956 All. 341.

16. *Collector of Customs v. Calcutta Motor & Cycle Co.*, A1958 Cal. 682 (687).

17. *Sharma v. Satish*, (1954) S.C.R. 1077; (1952-4) 2 C.C. 288 (292-4); A. 1954 S.C. 300.

18. *Sharma v. Satish*, A. 1954 S.C. 300.

19. *Madugula, in re*, A. 1957 A.P. 611.

20. *Amin v. State*, A. 1958 All. 293 (303).

21. *Sunder Singh v. State*, A. 1955 All. 367.

22. *Govinda, in re*, A. 1958 Mys. 150.

them" and that "there is an element of compulsion implicit in the process contemplated by s. 94",<sup>19</sup> it is difficult to resist the conclusion that a process under s. 94, Cr. P. C. cannot be issued against the accused himself for the production of documents in his possession that might support the prosecution, and that s. 94, in so far as it applies to the accused, must be held to be void.<sup>19,20</sup>

4. On the same ground, a notice to produce documents, under s. 171A of the Sea Customs Act, has been held to violate Art. 20 (3).<sup>21</sup>

On the other hand—

The protection under Art. 20 (3) does not extend to *public* documents in the possession of the accused.<sup>22</sup>

#### Whether accused can be compelled to exhibit his body.

1. The prohibition in the present clause is against the use of compulsion against a person to obtain disclosure as a 'witness' of oral or documentary evidence. It does not prohibit the use of compulsion requiring the accused to exhibit his body<sup>23</sup> for the purposes of establishing identity or for the holding of identification proceedings of suspects, taking their photographs or trying clothes upon their persons and the like.<sup>24</sup>

2. The provisions of s. 5 of the Identification of Prisoners Act, 1920 are not, accordingly, violative of Art. 20 (3).<sup>24,25</sup>

3. Even the recovery of blood-stained clothes<sup>1</sup> or other articles<sup>2</sup> from the person of the accused has been held not to amount to compelling him to be a witness.

4. Medical examination,<sup>26</sup> of the person of the accused or the taking of blood from his person for the purpose,<sup>3</sup> without his consent would also be justifiable for the same reason.

#### Whether accused can be compelled to give thumb-impression, specimen writing etc.: S. 73, Evidence Act.

The law on this point is yet uncertain.

1. In one group of cases it has been held that a mere direction of the Court to take the thumb or finger impression or specimen writing of the Court does not offend against Art. 20 (3).<sup>4,7</sup> The same view has been taken of impressions taken from the accused while in police custody,<sup>27</sup> without the use of any duress or compulsion.<sup>4,7</sup> If the accused

19. *Swarnalingam v. A. L. Inspector*, A. 1956 Mad. 165.

20. *Krishnan v. State of Kerala*, A. 1957 Ker. 78; *Hussain v. Prov. Fund Inspector*, A. 1957 M.B. 68.

21. *Collector of Customs v. Calcutta Motor Cycle Co.*, A. 1958 Cal. 682.

22. *Madanlal v. State*, A. 1958 Orissa 1.

23. *Pukhar Singh v. State*, A. 1958 Punj. 294 (298); *Deoman v. State*, (1958) 61 Bom. L.R. 30.

24. *Ram Swarup v. State*, A. 1958 All. 119 (126).

25. The contrary view in *Brij Bhushan v. State*, A. 1957 M.P. 106 is not in tune with the American decisions and does not appear to be sound.

1. *Palani, in re*, A. 1955 Mad. 495.

2. *Dastag\* v. State of Madras*, (1960) S.C. [Cr. A. 137/57].

3. *Subbaya v. Bhooopala*, A. 1959 Mad. 396 (400).

4. *State v. Parameswaran*, A. 1952 T.C. 482 (F.B.).

5. *State of Mysore v. Gopala*, A. 1954 Mys. 117.

6. *Muhammad Hussain, in re*, A. 1957 Mad. 47; *Palani, in re*, A. 1957 Mad. 546.

7. *Bhupendra v. Union of India*, A. 1959 H.P. 29.

8-9. *Nazirsingh v. State*, A. 1959 M.P. 411.



voluntarily submits to the order to give his impression or writing, he may be deemed to have waived his privilege under Art. 20 (3).<sup>10, 28</sup>

II. There is another group of cases<sup>11, 14</sup> which hold that if the accused is *compelled* to give his thumb-impression or specimen writing, *against his objection*, whether physical force is used or not, there is a violation of Art. 20 (3).

III. In another group of cases<sup>14, 17</sup> it has been held that if *physical force* is used in obtaining such impression or writing, it offends against Art. 20 (3).

IV. The view has also been taken<sup>18</sup> that so far as specimen writing is concerned, it can hardly be taken from an unwilling person without using physical force.

In the same strain is the view that the use in evidence of a thumb-impression of the accused taken during police investigation offends against Art. 20 (3).<sup>19</sup>

V. In some cases,<sup>14, 20</sup> it has been held that though a person cannot be compelled to give his thumb-impression, an adverse presumption can be drawn against him under s. 114 of the Evidence Act or any similar law, where he refuses to comply with the direction of the Court.<sup>21</sup>

VI. There are cases<sup>22, 23</sup> to the other extreme to hold that even the use of physical force would not involve a violation of Art. 20 (3), for, if the accused can be *compelled* to exhibit his body, by the use of force, if necessary, there is nothing wrong in obtaining thumb-impression or specimen writing from him, for the purposes of establishing his identity.

### 'Against himself'.

Art. 20 (3) is not attracted unless the accused is compelled to incriminate himself. Hence, s. 124 of the Bombay Police Act 1951 does not offend against Art. 20 (3), because it merely gives the accused an opportunity to explain the fact of his possession of property suspected to be stolen property, which would go against him if he does not explain.<sup>24</sup>

10. This view, of course, raises the question (p. 26, *ante*) whether the fundamental right under Art. 20 can be waived at all.

11. *Bhaluka v. State*, A. 1957 Orissa 172.

12. *Brij Bhushan v. State*, A. 1957 M.P. 106.

13. *Nazir Singh v. State*, A. 1959 M.P. 411 (412).

14. *Balraj v. Ramesh*, A. 1960 All. 157 (159).

15. *Shallendra v. State*, A. 1955 Cal. 247.

16. *State v. Abu*, A. 1959 Bom. 408 (413).

17. *Palani, in re*, A. 1957 Mad. 546.

18. *Farid v. State*, (1959) 63 C.W.N. 901 (904).

19. *Damodaran v. State*, A. 1960 Ker. 29.

20. *Ramswarup v. State*, A. 1958 All. 119.

21. This view requires further consideration inasmuch as once it is conceded that the accused has a right to refuse to give the impression which might incriminate him, it would be a denial of that right (guaranteed by Art. 20 (3)), if he is visited with the same consequence because of the exercise of his right to refuse. The real question is whether Art. 20 (3) gives him such right to refuse.

22. *Pukhar Singh v. State*, A. 1958 Panj. 294.

23. *Govinda Reddy, in re*, A. 1958 Mys. 150.

24. *State v. Lakhanamal*, (1958) 60 Bom. L.R. 403 (406).

Protection of life  
and personal liberty.

**21.** No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Object of Art. 21: Protection of personal liberty.**

The object of Art. 21 is to prevent encroachment upon personal liberty by the Executive save in accordance with law, and in conformity with the provisions thereof.<sup>24</sup>

Before a person is deprived of his life or personal liberty the procedure established by law must be *strictly* followed and must not be departed from to the disadvantage of the person affected.<sup>1</sup>

**Scope of Art. 21.**

The words 'except according to procedure established by law' suggest that Art. 21 does not apply where a person is detained by a private individual and not by or under authority of the State. Since no fundamental right is infringed when the detention complained of is by a private individual, Art. 32 also cannot be invoked in such a case.<sup>2</sup> [But a petition under Art. 226 would lie; see *post*].

**'Personal Liberty'.**

'Personal Liberty' in Art. 21 means freedom from physical restraint of person by incarceration or otherwise.<sup>3</sup>

**'Procedure established by law'.**

1. In Art. 21 the word 'law' has been used in the sense of State-made or enacted law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice.<sup>4</sup> Hence, the expression 'procedure established by law' in the same Article means the procedure prescribed by the law of the State. It is not proper to construe the expression in the light of the meaning given to the expression 'due process of law' in the American Constitution.<sup>5</sup>

2. 'Procedure established by law' in Art. 21 means the law prescribed by Parliament at any given point of time. Parliament has the power to change the procedure by enacting a law or amending it, and when the procedure is so changed, it becomes the 'procedure established by law'.<sup>6</sup> It follows that the power of a High Court to punish for contempt of itself, according to the Letters Patent, is a power to be exercised 'according to procedure established by law'.<sup>7</sup>

3. The Court is not entitled to examine the *reasonableness* of a law which is validly made under Arts. 21-22, for, Art. 19 is not applicable to a law made under Arts. 21-22; Arts. 21-22 form an exhaustive

25. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (133).

1. *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88 : (1950-51) C.C. 180 (181); *Naranjan v. State of Punjab*, A. 1950 S.C. 106.

2. *Vidya Verma v. Shivrarnain*, (1955) 2 S.C.R. 983.

3. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (133).

4. *Krishnan v. State of Madras*, (1951) S.C.R. 621 (Mahajan & Das JJ.).

5. *State of Bombay v. Mr. P.*, A. 1959 Bom. 182 (190). [Apart from the Letters Patent, Art. 215 itself could have been relied upon for the purpose].



constitutional code relating to personal liberty.<sup>6</sup> It is a valid law if it is enacted by a competent Legislature and if it does not violate any of the other fundamental rights declared by the Constitution.<sup>4</sup>

**Court's right to interfere when a person is deprived of liberty otherwise than according to procedure established by law.**

Art. 21 says that a person may be deprived of his liberty only according to procedure established by law. It follows, therefore, that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law.<sup>8</sup> And the Court, in a proceeding for *habeas corpus* will set the prisoner at liberty whenever this has not been done.<sup>9</sup> This principle has its application both in the case of punitive as well as preventive detention. Thus,—

#### (A) Punitive detention :

1. In *habeas corpus* proceedings, the legality or otherwise of the detention is to be determined by the Court with reference to the time of the return and not that of institution of the proceedings. Hence, where a Court adjourns a proceeding under s. 344 of the Criminal Procedure Code without making an order of remand to custody as required by that section, and there is no such order on the date of the return, the accused are entitled to be released on an application for *habeas corpus*.<sup>5</sup>

2. Under r. 41 of the Punjab Communist Detenus Rules, 1950, the Jail Superintendent was empowered to punish a detenu for 'jail offences'; if, however, he was satisfied that the offence was such that it was not adequately punishable by him, he might forward it to the Court of a Magistrate. *Held*, that where the Jail Superintendent had himself punished a detenu under this rule, he had no authority to refer the case again to a Magistrate, and any prosecution in such circumstances would be contrary to 'the procedure established by law' and, accordingly, invalid.

#### (B) Preventive detention :

Similarly, in the case of preventive detention, if the detention is not in *strict conformity* with the law authorising detention, the detenu is entitled to be released. Thus, the violation of the following provisions of the Preventive Detention Act has been held to invalidate the detention—

(i) Failure to communicate the grounds to the detenu within a reasonable time, as required by s. 7.<sup>7</sup>

(ii) Where a detenu's case is considered by only two of the three members who constitute the Advisory Board constituted under s. 8 (2) of the Act.<sup>10</sup>

(iii) Failure to refer the detenu's case to the Board within the time

6. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (79, 110).

7. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451 : (1950-51) C.C. 158 (160).

8. *Ram Narayan v. State of Delhi*, (1953) S.C.A. 399 : (1953) S.C.R. 652.

9. *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730.

10. *State of Bombay v. Atmaram*, (1950-51) C.C. 139 (182).

10. *Kishorilal v. The State*, A. 1951 Assam 169 (170).

fixed by s. 9 (1), even though the detenu may have been temporarily released under s. 14 (1).<sup>11</sup>

(iv) Where the period of detention was fixed in the initial order of detention.<sup>11</sup>

(v) Where the Government revoked a previous order of detention in conformity with the opinion of the Advisory Board, but by the same order, confirmed the detention under one of the sub-clauses of s. 3 (1) (a) of the Act.<sup>12</sup>

(vi) When the order was not in conformity with s. 11 of the Act.<sup>12</sup>

**22. (1)** No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Protection against arrest and detention in certain cases.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

<sup>13</sup>(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention ;

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

11. *Makhan Singh v. State of Punjab*, (1950-51) C.C. 180 (181) ; (1950) S.C.R. 88.

12. *Shibbanlal v. State of U. P.*, (1954) S.C.R. 418 : (1952-54) 2 C.C. 321.

13. In its application to the State of Jammu and Kashmir, in clauses (4) and (7) of article 22, for the word 'Parliament', substitute 'the Legislature of State'.



(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

<sup>14</sup>(7) Parliament may by law prescribe—

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

**Arts. 21-22.**—(1) Art. 22 does not form a complete code of constitutional safeguards relating to preventive detention. To the extent that provision is made in Art. 22 it cannot be controlled by Art. 21; but on points of procedure which expressly or by necessary implication are not dealt with by Art. 22, Art. 21 will apply.<sup>15</sup>

(2) Consequently, in a case of preventive detention, the procedure prescribed by the law under which the detention is made must be strictly followed, and if this is not done, the person detained is entitled to be released by the Court.<sup>16</sup>

#### Cl. (1): Safeguards against arrest.

1. The language of cls. (1) and (2) of this Article suggests that the fundamental right conferred by this Article gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has or is suspected to have committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest.<sup>16</sup>

2. The words 'arrest and detention' have been interpreted to

14. In its application to the State of Jammu and Kashmir, in clauses (4) and (7) of article 22, for the word 'Parliament', substitute 'the Legislature of the State'.

15. *Gopalan v. State of Madras*, (1950) S.C.R. 88; (1950-51) C.C. 74 (133).

16. *State of Punjab v. Afail Singh*, (1953) S.C.R. 254 : (1952-54) 2 C.C. 303.

mean arrest and detention by a non-judicial authority upon an accusation of a criminal or quasi criminal nature.

Hence, the following have been held not to constitute 'arrest and detention' within the meaning of this article—

(a) The physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer-in-charge of the nearest camp under s. 4 of the Abducted Persons' Recovery and Restoration) Act, 1949.<sup>17</sup>

(b) Arrest under s. 48 of the Madras Revenue Recovery Act for recovery of arrears of income-tax.<sup>18</sup>

(c) Removal of persons from a brothel, under the Bengal Suppression of Immoral Traffic Act.<sup>19</sup>

3. On the other hand, the protection of the clause has been extended to arrest under orders of the Speaker of a Legislature for contempt.<sup>20</sup>

#### Right to be informed of the grounds.

1. The object of this safeguard is that on learning of the grounds of arrest, the person arrested will be in a position to make an application to the appropriate Court for bail, or move the High Court for *habeas corpus*. The intimation will also enable the arrested person to prepare his defence in time for the purposes of his trial.<sup>21</sup>

2. Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge framed by the Court for the trial of a case.<sup>22</sup> Thus, merely to inform the person that he has been arrested under s. 7 of the Criminal Law Amendment Act, 1932, without giving any particulars of the alleged acts for which such action has been taken against him, is not sufficient compliance with Art. 22 (1).<sup>23,24</sup>

#### Cl. (2): Right to be produced before nearest Magistrate.

1. This clause not only affirms but also liberalises the provision contained in s. 61 of the Cr. P. C. by extending the right to persons arrested in pursuance of a warrant.<sup>25</sup>

2. If 24 hours have passed without compliance with the requirement of the clause, the arrested person is entitled to be released forthwith.<sup>26</sup>

3. The 'nearest Magistrate' refers to a Magistrate acting under a judicial capacity, as under s. 167 of the Cr. P. C.<sup>27</sup>

Hence, when a person is arrested by a Magistrate acting under s. 64 of the Cr. P. C., read with the U. P. Social Disabilities Act, the arrested person must be produced before another Magistrate, acting

17. *Collector of Malabar v. Hafee*, (1958) S.C.A. 399 (404).

18. *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

19. *Gumpati v. Nafisul*, A. 1954 S.C. 636 : (1952-54) 2 C.C. 309.

20. *Vimal Kishore v. State of U. P.*, A. 1956 All. 56 (59).

21. *Madhu v. State*, A. 1959 Punj. 506.

22. *Hartharanand v. Jallor*, A. 1954 All. 355.



under s. 167, Cr. P. C.<sup>23</sup> But it has been held that where a person was arrested by a Station Officer on his own authority, and immediately thereafter the City Magistrate (invested with judicial powers) arrived at the spot in his executive authority, and the person arrested having been produced before such Magistrate, he remanded him to jail custody, there was sufficient compliance with Art. 22 (2).<sup>24</sup>

### 'As soon as may be'.

1. The words 'as soon as may be' means as nearly as is reasonable in the circumstances of the particular case. So, no definite period of time can be laid down as reasonable in all cases.<sup>25</sup> The expression also occurs in cl. (5) and has been commented upon under that clause.

2. But it will be possible for the Court, in a proceeding for *habeas corpus*, to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a reasonable time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the Court would order his immediate release.<sup>1-2</sup>

3. Since in *habeas corpus* proceedings the material date for determining the validity of the detention is the date of return, where the Court finds that a reasonable time for communicating the grounds had expired before the date of return, a communication subsequent to the return cannot save the detention of the Petitioner from invalidity,<sup>3</sup> for, the detention became invalid as soon as the reasonable time expired.

### 'The right to consult legal practitioner'.

The person arrested has a right to consult a legal adviser of his own choice, ever since the moment of his arrest and also to have effective interview with the lawyer out of the hearing of the police, though it may be within their presence.<sup>3</sup>

### Right to be defended by a legal practitioner.

1. The article does not guarantee any absolute right to be supplied with a lawyer by the State. The only right is to have the opportunity to engage a lawyer.<sup>4</sup>

23. *Eshaq v. State of U. P.*, A. 1957 All. 782.

24. *Ram Manohar v. Supdt., Central Prison*, A. 1955 All. 193. [The soundness of this decision requires further examination. The words 'court of the magistrate' in Art. 22 (2) should not be overlooked. Can it be said that the City Magistrate who visited the spot in his executive capacity, was holding his court there? The words 'court of the Magistrate' correspond to the words 'Magistrate's Court' in s. 61 of the Cr. P. C. How is the accused to get opportunity to consult a lawyer, if he is not taken to a court? The fact that the clause extends even to persons arrested under warrant suggests that the right of production before a Magistrate in his judicial capacity is an independent right and that the requirement must be strictly complied with].

25. *Tarapada v. State of West Bengal*, (1951) S.C.J. 233 : (1950-51) C.C. 151.

1. *State of Bombay v. Atmaram*, (1951) S.C.R. 167 : (1950-51) C.C. 139.

2. *Vimal Kishore v. State of U. P.*, A. 1956 All. 56 (59).

3. *Molibai v. State*, A. 1954 Raj. 241.

4. *Janardhan v. State of Hyderabad*, (1951) S.C.R. 344 : (1950-51) C.C. 233 (235).

2. Where a trial is held without informing the accused of the date fixed for trial and without giving him an opportunity of getting into communication with his legal adviser, the conviction is liable to be set aside.<sup>5</sup>

**Cl. (3) (b): Nature of preventive detention and the constitutional safeguards relating thereto.**

1. 'Preventive detention' means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention. While the object of *punitive* detention is to punish a person for what he *has done*, the object of preventive detention is to prevent him *from doing* something which comes within the entries 9 of List I and 3 of List III.<sup>6</sup> The object of preventive detention is to prevent the individual not merely from acting in a particular way, but from achieving a particular *object*.<sup>7</sup> No offence is proved, nor any charge formulated; and the justification is *suspicion* or reasonable probability and not criminal conviction which only can be warranted by legal evidence.<sup>7</sup>

2. The object of the framers of the Constitution in giving a constitutional status to preventive detention was to prevent anti-social and subversive elements from imperilling the welfare of the infant Republic. But though they recognized the necessity of laws for preventive detention, they also provided certain safeguards to mitigate their harshness, by placing fetters on the legislative power conferred on this subject, under Arts. 21-22:

(i) By reason of Art. 21—

(a) Preventive detention cannot be ordered by the Executive without the authority of a law and unless in conformity with the procedure laid down therein.

(b) The law must be a valid law, *i.e.*, within the legislative competence of the Legislature which is enacting it.

(ii) Art. 22 next imposes the following restrictions upon the power of the Legislature itself to enact a law of preventive detention:

"(1) That no law can provide for detention for a period of more than 3 months unless the sufficiency for the cause of detention is investigated by an Advisory Board within the said period of three months [cl. (4)].

(2) That a State law cannot authorize detention beyond the maximum period prescribed by Parliament under the powers given to it under cl. (7).

(3) That Parliament also cannot make law authorizing detention beyond 3 months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in cl. (7).

(4) Provision has also been made to enable Parliament to prescribe the procedure to be followed by Advisory Boards, as a safeguard against any arbitrary procedure.

(5) Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of Article 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention

5. *Hansraj v. State*, A. 1956 All. 641.

6. Defence, foreign affairs, security of India; security of a State, maintenance of public order or of supplies and services essential to the community.

7. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74.



and has also the right to make a representation protecting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention. . . ."

### Ambit of the Court's jurisdiction in cases of detention.

The Court can pronounce upon the validity of an order of preventive detention on any of the following grounds :

(i) The Court may examine the validity of the law itself (a) on the ground of *competence* of the Legislature, i.e., whether the subject-matter of the legislation is covered by the legislative Entry relating to preventive detention under which it is purported to have been made; (b) on the ground of its being *ultra vires*, by reason of contravention of Art. 22 of the Constitution.

(ii) When a law of preventive detention is challenged before the Court, the Court has got to decide on a consideration of the true nature and character of the legislation whether it is *really* on the subject of preventive detention or not. But once the legislation is held to be really on the subject of preventive detention and within the powers assigned to the Legislature in question, the Courts have nothing to do with the reasonableness or unreasonableness of the legislation. If a particular piece of legislation be within the ambit of the Legislature's authority, there can be nothing *arbitrary* in it, so far as a Court of law is concerned.<sup>8a</sup>

Of course, the authority vested with the power of enforcing the legislation may commit an abuse of such power, in which case the act of that authority would be illegal, but that would not invalidate the legislation itself. To decide whether a piece of legislation is *ultra vires* the only question to be considered is whether it is within the ambit of the legal powers of the Legislature. The illegality of the exercise of a legislative power or the possibility of its abuse has nothing to do with the validity of the legislation itself.<sup>9</sup>

(iii) The Court may examine the grounds to see whether they are relevant to the circumstances under which preventive detention could be supported,<sup>9</sup> e.g., security of India or of a State, maintenance of public order, etc.

(iv) The Court may examine the grounds to see whether the grounds supplied have a relevant connection with the order. Thus, though the Court would not undertake an investigation as to the sufficiency of the materials on which the satisfaction of the detaining authority was grounded, it would examine the *bona fides* of the order and interfere if it was *mala fide*,<sup>9</sup> that is to say, if the law of preventive detention was used for any purpose other than that for which it was made.

(v) The Court may examine the grounds communicated to the detenu to see if they are sufficient to enable him to make an effective representation.<sup>9,10</sup> While the sufficiency of the ground in the sense whether it would give satisfaction to the Government is not a matter for examination by the Courts, the sufficiency of the grounds in the sense of enabling the defence to make an effective representation can be examined by the Courts<sup>9,10</sup> [see further, under 'what are vague grounds', *post*].

8. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (223, Mahajan J.).

8a. *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43).

9. *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

10. *Tarapada v. State of West Bengal*, (1951) S.C.R. 212 : (1950-51) C.C. 139, 151.

**What the Court cannot do in an application under Art. 32 or 226 against an order of preventive detention.**

From the foregoing discussion, it is clear that the Court cannot do any of the following things, when the validity of a detention order under the Preventive Detention Act is challenged before it :

1. When an order of preventive detention is challenged in a court of law, the Court is not competent to enquire into the truth or otherwise of the facts which are mentioned as grounds in the communication to the detenu under Art. 22 (5). Again, the sufficiency of the grounds upon which the satisfaction of the authority issuing the order of detention purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a court of law, except on the ground of *mala fides*.<sup>11</sup>

2. It cannot go into the question whether on the *merits* the detaining authority was justified to make the order of detention or to continue it.<sup>12</sup> Thus, the High Court cannot interfere on the ground that in view of the fact that times have changed, further detention would be unjustified.<sup>13</sup>

3. It is for the Advisory Board and not the Courts to examine the correctness of the statements made in the affidavits in support of the order of preventive detention.<sup>14</sup>

#### **When is an order *mala fide*.**

1. An order of detention is *mala fide* if it is made for a 'collateral' or 'ulterior' purpose, *i.e.*, a purpose other than what the Legislature had in view in passing the law of preventive detention,<sup>15</sup> *i.e.*, prevention of acts prejudicial to the security of the State, maintenance of public order and so on. There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of this law itself,<sup>16</sup> or when it appears that the authority making the order did not apply his mind to it at all,<sup>17</sup> or made it for a purpose other than that mentioned in the detention order.<sup>18</sup>

2. The *onus* of proving *mala fides* is upon the detenu, and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

Thus, an order of detention is not *mala fide* by reason of the following :—

(i) Merely that the order of detention is made after failure to secure a conviction under the ordinary criminal law. Similarly, where there is a pending criminal case against a person,—if the case is withdrawn and an order of detention is made against him the order is not necessarily *mala fide*.<sup>19</sup> The proper approach is to consider the facts

11. *Shibbanlal v. State of H. P.*, (1954) S.C.R. 418 : (1952-54) C.C. 321.

12. *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18 : (1950-51) C.C. 177 (179) : A. 1951 S.C. 481.

13. *Madan Lal v. State of Bihar*, (1951) 30 Pat. 716.

14. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (218, Sastri J.).

15. *Ibid.*, p. 285, Mukherjee J.

16. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

17. *Puranlal v. Union of India*, A. 1958 S.C.R. 163.

18. *Raman Lal v. Commr. of Police*, A. 1952 Cal. 26 (30); *Maledath v. Commr. of Police*, A. 1950 Bom. 202; *Baboo Ram v. State*, A. 1951 All. 838 (842).



of each case to determine whether the order was *mala fide*, or not.<sup>19</sup> There is no rule of law that where a person can be prosecuted under the ordinary criminal law, to order of detention can ever be made against him.<sup>20</sup> Whether the person should be prosecuted or detained, is a matter for the authorities to decide.<sup>21</sup>

Further, there is no question of *mala fides* unless the charges in the criminal prosecution are shown to be identical with the grounds of detention.<sup>22</sup>

(ii) Merely that the order of detention refers to *past* activities of the detenu as giving rise to the satisfaction of the detaining authority,<sup>23, 24</sup> or activities taking place outside the jurisdiction of the authority making the order of detention,<sup>25</sup> (because, once the grounds are relevant, the Court cannot inquire into the reasonableness of the subjective satisfaction of the detaining authority).<sup>26</sup>

(iii) That a person has been, on the expiry of his detention under a temporary law of preventive detention, detained on the *self-same* grounds under another Act.<sup>27, 1</sup>

(iv) That *wrong* facts were placed before the authority which issued the order.<sup>28, 2</sup>

(v) Merely that a fresh order is made superseding a former order which was defective.<sup>3</sup>

(vi) That there were certain disputes between the detenu and a Minister, when the Secretary who issued the detention order was not influenced by the Minister who was in charge of a different Department.<sup>4</sup>

(vii) That the action of the Police was *mala fide*, when there is nothing to show that the detaining authority did not apply his mind.<sup>5</sup>

#### **Bona fides of successive orders.**

(A) (i) Where the Court has declared, *on the merits*, the detention of a person to be without justification, a subsequent order of detention on the *same* grounds would obviously be *mala fide*. If, however, the decision proceeded simply on the ground that the law under which the order had been made was invalid or the order was irregular *in form*, a fresh order of detention under new legislation,<sup>6</sup> or a fresh order of detention in a valid form based on the pre-existing grounds themselves<sup>7</sup> is not *mala fide*.

19. *Jagannath v. State of Bihar*, A. 1952 Pat. 185 (193) F.B.; *Ratanlal v. D. M. Ganjam*, A. 1952 Orissa 52.

20. *Rambhuj v. Punjab State*, A. 1954 Punj. 154.

21. *Jhala Jorubha v. State*, A. 1952 San. 12 (16).

22. *Thakur Prasad v. State of Bihar*, A. 1955 S.C. 631.

23. *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18 (24) : A. 1951 S.C. 481.

24. *Joglekar v. Commr. of Police*, A. 1956 S.C. 28.

25. *Sarju v. State*, A. 1956 All. 589 (593).

1. *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 155.

2. *Pyarelal v. State*, A. 1952 All. 180.

3. *Naranjan v. State of Punjab*, A. 1952 S.C. 109 : (1952) S.C.R. 395.

4. *Gour Gopal v. Chief Secretary*, (1952) 50 C.W.N. 427.

5. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

6. *Ananta v. The State*, A. 1951 Orissa 27.

(ii) In the case of a pending proceeding,—if at any time *before* the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release *merely* on the ground that at some prior stage, there was no valid cause for detention.<sup>7</sup> Of course, if it appears on the facts of the case that the order was not made *bona fide* on being satisfied that the petitioner's detention was still necessary, but was made obviously to *defeat* the pending petition challenging the validity of the earlier order, the later order would be held to be *mala fide* and the detenu released. But, in the absence of proof of bad faith, there is nothing to prevent the detaining authority to supersede a defective order by a valid order while a proceeding challenging the validity of the earlier order is pending.<sup>8</sup>

(iii) By reason of ss. 11 (2) and 13 (2) of the amended Preventive Detention Act, it will no longer be possible to make a fresh order of detention on the *same* ground, if the Advisory Board has once reported that there is no sufficient ground for detention. Again, by reason of s. 9, it will not be possible to withhold reference to the Advisory Board by making successive orders. Any such action would be *mala fide*.

(B) On the other hand, the order was held *mala fide* in the following cases—

(i) The Court reserved judgment in an application for *habeas corpus* against an order of detention and 3 days later, delivered judgment making the *rule nisi* absolute. During this interval, Government had a conference with its legal advisers and came to the conclusion that the Petitioner would, in all probability, be released by the Court on account of a technical defect in the form of the order and so passed a subsequent order of detention which, however, was not brought to the notice of the Court. Within a few minutes after the delivery of judgment, the petitioner was re-arrested under the subsequent order of detention. *Held*, the subsequent order, not having been communicated to the Court, lacked *bona fides* and was made solely with the object of defeating the order of the Court during the pendency of the application upon the previous order.<sup>9</sup>

(ii) The petitioner was all along detained in jail as an under-trial prisoner in three cases for about 6 months. In one of them he was acquitted and in another discharged. Immediately thereafter, while the third case was still *pending*, he was served with an order of detention under the Preventive Detention Act, mentioning his past activities prior to his detention as under-trial prisoner, extending for a period of 2 years, as the ground of detention. *Held*, that the order of preventive detention was made for a collateral purpose,—either to *punish* him for his past acts or to prejudice his defence in the pending case. Hence, the order was *mala fide* and illegal.<sup>10</sup>

(iii) Where the detention was made simply with the object of making a secret investigation into a crime, in contravention of the provisions of the Criminal Procedure Code.<sup>11,12</sup>

(iv) Where the primary purpose of the order of detention was only to circumvent the orders of bail issued by the Court or to effect an illegal extension of the period of imprisonment served out by the prisoner.<sup>12</sup>

7. *Ananta v. State*, A. 1951 Orissa 27.

8. *In re Gopalan*, (1952) 11 M.L.J. 690.

9. *Ishar Singh v. The State*, A. 1953 Pepsu 111.

10. *Vimlabai v. Emperor*, I.L.R. (1945) Nag. 6.

11. *Bharatham v. Commissioner of Police*, A. 1950 Bom. 202.

12. *In re Srinivasan*, A. 1949 Mad. 761; *Mani v. District Magistrate*, A. 1950 Mad. 162 (176).



**Cl. (4): Scope of Advisory Board.**

1. The only function of the Advisory Board is to report to the Government whether a detenu is liable to be detained for a period exceeding 3 months, subject to the maximum laid down by Parliament under Cl. (7) (b).<sup>13</sup> Such report will enable the Government to detain the person beyond three months, provided the detention be valid on its merits.

2. The function of the Board is purely advisory and it does not make the detention valid if it is *ultra vires* the P. D. Act or the Constitution. Hence, *habeas corpus* would still lie against the initial order of detention notwithstanding report of the Advisory Board,<sup>14</sup> confirming it,—for instance, on the ground that the law is *ultra vires* or that the order is *mala fide*. Again, *habeas corpus* would lie even before the detenu's case is placed before or considered by the Advisory Board. In other words, the High Court's jurisdiction under art. 226 is not in any way controlled by the constitution of Advisory Boards.<sup>15</sup>

3. Similarly, the disposal of an application for *habeas corpus* under Art. 226 cannot affect an applicant's case before the Advisory Board. The Court and the Advisory Board function in different areas.<sup>16</sup>

4. If the Advisory Board reports against the order of detention, it would be illegal for Government to detain the person beyond three months, under Art. 22 (4). S. 11 (2) of the amended Detention Act, requires the appropriate Government, in such a case, to revoke the detention order and to release the detenu *forthwith* [see p. 149, *post*].

**Cl. (5): The right of representation.**

1. Art. 22 (5) gives to the detenu the right to make a representation, but no right to be heard by an independent tribunal.<sup>17</sup>

2. The detention order will be invalid if the requirements of this clause are not complied with e.g., if the grounds on which the order has been made have no connection with the order, or have no connection with the circumstances or classes of cases under which preventive detention could be supported,<sup>18</sup> or the grounds are too vague to enable him to make the representation.<sup>19</sup>

3. When an order of preventive detention is challenged on the ground that it contravenes Art. 22 (5), the question for determination by the Court is not whether the petitioner will in fact be prejudiced in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.<sup>20</sup>

4. The sufficiency of the particulars conveyed to a detenu is a justiciable issue under cl. (5), the test being whether they are sufficient to enable him to make an effective representation.<sup>21</sup>

13. The maximum period now prescribed by s. 11A of the P. D. Act is 12 months from the date of detention.

14. *Prem Dutt v. Supdt., Central Prison*, A. 1954 All. 315.

15. *Raman Lal v. Commr. of Police*, (1951) 56 C.W.N. 42.

16. *Gopalan v. State of Madras*, (1950) S.C.R. 88 : (1950-51) C.C. 74 (133).

17. *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708 : (1952-54) C.C. 317 : A. 1953 S.C. 318.

18. *Shibban Lal v. State of U.P.*, (1954) S.C.R. 418.

**'Grounds' and 'facts': what is to be communicated.**

1. 'Grounds' means the *conclusions* drawn by the authorities from the 'facts' or 'particulars'.<sup>19</sup>

2. Art. 22 (5) only obliges the authorities to communicate to the detenu the *grounds* on which the order of detention has been made, i.e. to indicate the kind of prejudicial activity the detenu is being suspected to be engaged in. But the obligation to furnish sufficient facts or particulars comes from the duty of the authorities under the second part of Art. 22 (5), viz. to 'afford the detenu the earliest opportunity of making representation', for, without getting information sufficient to make a representation against the order of detention, it is not possible for the man to make the *representation at all*.<sup>20</sup> Hence, a person detained is entitled, in addition to the right to have the ground of his detention communicated to him, to a further right to have particulars as full and adequate as the circumstances permit furnished to him as to enable him to make a representation against the order of detention and the sufficiency of particulars conveyed in the second communication is a justiciable issue, the test being whether they are sufficient to enable the detained person to make a representation which on being considered may give him relief.<sup>21</sup>

3. But, while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.<sup>22</sup>

4. Though it was not obligatory upon the authority to disclose *all* facts other than those which he had the privilege to withhold under Art. 22 (6), the authority must, nevertheless, furnish information sufficient to enable the detenu to make representation. If the particulars supplied were not sufficient for that purpose, there was a violation of Art. 22 (5), and the detenu was entitled to be released. 'Particulars' may, however, be furnished subsequent to the communication of the grounds. But once the *grounds* are communicated no new or additional grounds may be furnished.<sup>23</sup> In *Ujagar's case*<sup>24</sup> it has been held that where particulars are necessary in order to make the grounds intelligible for the purpose of making a representation at the earliest opportunity, the particulars also must be furnished 'as soon as may be', so that the right under Art. 22 (5) may not be defeated.

5. Failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a court of law as an invasion of a fundamental right or safeguard guaranteed by the Constitution, viz., being given the earliest opportunity to make a representation.<sup>25</sup>

**What is a 'vague' ground.**

1. An 'irrelevant' ground is a ground which has no connection at all with the satisfaction of the authority, while a 'vague' ground is one which is not sufficient to enable the detenu to make an effective repre-

19. *State of Bombay v. Atmaram*, (1951) S.C.R. 167 (179), Kania C.J.

20. *Ram Singh v. State of Delhi*, (1951) S.C.R. 451 : (1950-51) C.C. 158 (163) : A. 1951 S.C. 270; *Puranlal v. Union of India*, (1958) S.C.R. 460.

21. *Ujagar v. State of Punjab*, (1950-51) C.C. 155.



sensation.<sup>22</sup> A communication which is not readily intelligible by a layman without legal aid, is vague.<sup>23</sup>

2. The question whether the grounds furnished are vague or not, has to be determined on a consideration of the circumstances of each case.<sup>24</sup>

Particulars of things which the person apprehended to do in the future cannot be given, in the very nature of things, with as much definiteness as of events which have already taken place.<sup>25</sup> It is not necessary to indicate the objectionable passages of the alleged speeches delivered by the detenu of their time and place and their general nature and effect are stated.<sup>1</sup>

3. If on reading the ground furnished it is capable of being intelligently understood<sup>26</sup> and is sufficiently definite to enable the detenu to make a representation against the order of detention, it cannot be called vague.<sup>24</sup>

4. The constitutional requirement that the grounds must not be vague, must be satisfied with respect to each of the grounds communicated to the person detained subject to the claim of privilege under cl. (6) of Art. 22 of the Constitution. Where any of the several grounds communicated to the detenu is vague, there is an infringement of Art. 22 (5).<sup>22</sup>

5. If the grounds are not sufficient to enable the detenu to make a representation, he may, if he likes, ask for particulars which would enable him to make a representation.<sup>1a</sup> If he does not ask for such particulars, his inaction may, in particular circumstances, be taken into consideration in deciding whether the grounds can be considered to be vague.<sup>2</sup>

#### Instances of vague grounds.

Subject to the foregoing general observations, the following cases may illustrate what grounds have or have not been held to be vague.

(A) In the following cases, the grounds have been held to be vague.

1. "In pursuance of the policy of the Communist party, you are engaged in preparing the masses for violent revolutionary campaign and attended secret party meetings to give effect to this programme."<sup>27</sup>

2. "You tried to create public disorder amongst tenants in *Una Tehsil* by circulating and distributing objectionable literature issued by underground communists."<sup>28</sup>

3. "That you along with your associates have been collecting and are likely to collect arms and ammunitions illegally for illegal purposes and illegal activities."<sup>29</sup>

*Held*, the grounds were too vague to enable the detenu to make a representation; it did not mention either the time when or the place where or the purposes or activities for which the arms were collected.<sup>3</sup>

4. Similarly, where the grounds supplied alleged that the petitioner was a member of the Communist Party and is likely to go underground to further the plans of the Communist Party, *viz.*, commission of sabot-

22. *Tarapada v. State of W.B.*, (1951) S.C.R. 212 (218).

23. *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708.

24. *State of Bombay v. Atma Ram*, (1951) S.C.R. 167 (184).

25. *Naresh v. State of W.B.*, A. 1959 S.C. 1335 (1341).

1. *Ram Singh v. State of Delhi*, A. 1951 S.C. 270.

1a. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (390).

2. *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 155.

3. *Sushila v. Commissioner of Police*, (1950) 5 D.L.R. 242 (Bom.).

age and violence, *held*, that the grounds were vague for omission to state when, where and with whom he was going to plan.<sup>4</sup>

5. Where the detenu was said to be "of a desperate character" and his political creed was said to be Communism.<sup>5</sup>

6. To allege that the applicant's 'local reputation is so bad that he is known as a smuggler and profiteer'.<sup>6</sup>

7. That the detenus were smuggling cloth and other supplies essential to the community—*held* vague for want of particulars as to date and the like.<sup>7</sup>

8. To allege that "all murderers and all *badmashes* meet at the place of the detenu and that he and members of his party are schemers and do no cultivation themselves."<sup>8</sup>

(B) On the other hand—

1. Where the grounds furnished to the detenu stated that "he threatened public peace and tranquillity in a *certain* district by urging violent methods specially among the labour classes and that his speeches at public meetings and demonstrations were prejudicial to the maintenance of public order in that district", *held*, the grounds communicated were sufficient to enable the detenu to make a representation.<sup>9</sup> It is not necessary to quote the objectionable passages in the communication.<sup>10</sup>

2. Where the grounds stated that the Petitioner was a member of the Communist Party of India which was spreading a doctrine of violence to acquire power and that though since 1950, the party had been divided into two groups by changing its draft programme, in fact, the change was a mere camouflage and the party was carrying on loot in some districts, *held*, the grounds were not vague for omission to mention to which group the Petitioner belonged.<sup>11</sup>

3. Where the ground stated—

"That you have been assisting the operations of the Communist party of India . . . which has for its object commission of rioting with deadly weapons . . . thus acting in a manner prejudicial to the maintenance of public order;

that as a member of the C.P.I., you have fomented trouble amongst the peasants of the Howrah district . . . and amongst the tramways men and other workers at Calcutta,"

and in continuation of these grounds, instances of meetings and processions with dates were furnished, illustrating the attempt to foment trouble amongst workers, *held*, the grounds were not vague.<sup>12</sup>

4. Where in the grounds it was stated, that with a view to prejudice the relations of India with the Portuguese Government and also the security of India, the detenu was carrying on espionage with financial help given by the Portuguese authorities in Goa, collecting intelligence about the security arrangements on the border, *held*, the grounds were not vague by reason of the details of the financial aid

4. *Kulomoni v. The State*, A. 1950 Orissa 20.

5. *Anania v. State*, A. 1951 Orissa 27.

6. *Ramanlal v. Commr. of Police*, A. 1955 Cal. 26 (29).

7. *Baktawar v. State*, A. 1951 Simla 157.

8. *Pannaram v. State*, A. 1954 Punj. 133.

9. *Benoy v. Govt. of Assam*, A. 1950 Assam 49.

10. *Ram Singh v. State of Delhi*, (1950-51) C.C. 158; A. 1951 S.C. 270.

11. *Sheobachan v. State of Bihar*, A. 1952 Pat. 177.

12. *Tarapada v. State of West Bengal*, (1950-51) C.C. 151.



or the length of the period for which the detenu was carrying on his activities not having been given, particularly because, having regard to the nature of the activities and the strained relations between India and Goa, it was against the public interest to disclose further particulars.<sup>12a</sup>

### What is an 'irrelevant' ground.

1. A ground is irrelevant if it is not relevant to any of the circumstances under which preventive detention can be made [under s. 3 of the P. D. Act, read with List I, Entry 9 and List III, Entry, 3].<sup>13</sup>

2. Where the contention is that any of the grounds of detention is irrelevant or vague, the grounds must be read as a whole to see whether it is relevant. If its relevancy appears upon a reading of all the grounds together, the detention order would not be vitiated.<sup>14</sup>

### Illustration.

(i) One of the grounds in the detention order was that the Petitioner had used his position as the head of the caste, to increase his influence over the residents of the area, and had created a band of obedient and trusted associates, by inflicting fines and excommunication upon those who disregarded his wishes. It was contended that this ground was irrelevant as it had no connection with 'security of the State or maintenance of public order',—the Petitioner having exercised only such powers as belonged to him as the head of the caste. *Held*, it was not irrelevant, inasmuch as the grounds read as a whole indicated the charge against the Petitioner that he aimed at setting up a parallel government in the area and that in order to achieve this end he did various acts such as intimidating the workers with threats of murder, and his own workers and associates with penalties, unless they carried out his wishes.<sup>14</sup>

(ii) Where the first ground was that the Petitioner, at a public meeting, "vented feelings of violence against the Prime Minister of India" and that "Sbri Nehru should be murdered if necessary", for having turned a deaf ear to the miseries of the refugees, and the other grounds were that he exhorted the audience to "build up a strong movement against the implementation of the Nehru-Noon Pact" and "to rouse passions by alleging that the Prime Minister had no sympathy for West Bengal", *held*, that the latter grounds must be read with the first one and, when so, read, they could not be said to be irrelevant to the maintenance of 'public order'.<sup>15</sup>

### When one of several grounds is irrelevant or vague.

1. The constitutional requirement of cl. (5) must be satisfied in respect of each one of the grounds communicated to the detenu, subject, of course, to the claim of privilege under cl. (6).<sup>16</sup>

2. On this point, there is no distinction between 'irrelevant' and 'vague' grounds.

Thus,

If any of the grounds or reasons that led to the satisfaction be

12a. *D'Souza v. State of Bombay*, (1956) S.C.R. 382.

13. *Gopalan v. State of Madras*, (1950) S.C.R. 88 (223).

14. *Shamrao v. D. M. Thana*, (1952) S.C.R. 683 (695): (1952-54) C.C. 314.

15. *Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341).

16. *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708: (1952-54) C.C. 317: A. 1950 S.C. 318.

'irrelevant', the detention would be invalid even if there are other relevant grounds, because it can never be certain to what extent the bad reasons operated on the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.<sup>17,18</sup>

#### *Illustration.*

In the impugned order of detention, the detaining authority mentioned two grounds, viz., that the activities of the detenu were prejudicial to (a) the maintenance of supplies essential to the community; (b) the maintenance of public order.

The Advisory Board, to which the case was referred, did not uphold the detention on the first ground, viz., maintenance of supplies essential to the community (see s. 3 (1) (iii) of the Preventive Detention Act), and the Government revoked the detention on this ground, but confirmed it on the other ground, viz., maintenance of public order.

*Held*, the order was vitiated as soon as the Government admitted that one of the two grounds upon which the detaining authority had acted, was non-existent.<sup>19</sup>

#### **Effect of supplying vague grounds.**

1. When the grounds supplied to the petitioner at the time of the order are so vague (apart from questions of technical defects) as prevents the detenu to make a representation, the constitutional right of the detenu to make a representation at "the earliest opportunity" [Art. 22 (5)] is infringed and this renders the detention order void *ab initio*.<sup>20</sup>

2. If, however, it appears that the grounds were known to the petitioner and that he was not prejudiced by any defect in the grounds communicated by the authority, he cannot obtain his release on account of such defects.<sup>21</sup>

3. Similarly, where the detenu has already made a detailed representation to the Advisory Board, it is not open to him to contend before the Court that the grounds were so vague that representation was not possible.<sup>22</sup>

#### **Cl. (6) : Discretion of authority not to disclose facts.**

1. While it is obligatory upon the authority to disclose all the 'grounds', the detaining authority has been given an absolute discretion to withhold facts which it would be against the public interest to disclose, according to the opinion of such authority.<sup>23</sup> [See p. 129, ante].

2. The Court has no power to impose its opinion as to whether it is against the public interest or not to disclose any particular fact or facts. Once the authority refuses to disclose any fact or facts in the 'public interest', the Court shall have no power to declare that it was not against the public interest to disclose those facts.<sup>24</sup>

17. *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418 : (1952-54) C.C. 321.

18. *Dwarka v. State of J. & K.*, (1956) S.C.R. 948 : A. 1957 S.C. 164.

18a. *State of Bombay v. Almaram*, (1951) S.C.R. 167 : (1950-51) C.C. 139; *Ujagar v. State of Punjab*, (1950-51) C.C. 155 (157); *Puranlal v. Union of India*, (1958) S.C.R. 460.

19. *Ram Adhar v. State*, A. 1951 All. 18.

20. *Ramnabhan v. State of Hyderabad*, A. 1952 Hyd. 186.

21. *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (391).



"Art 22 (6) gives a right to the detaining authority not to disclose such facts, but from that it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right. A wide latitude is left to the authorities in the matter of disclosure."<sup>21a</sup>

The Court can interfere not on the ground that what has been withheld should have been disclosed, but on the ground that what has been stated is insufficient for making a representation.<sup>21a</sup>

3. Nor should it be supposed that since cl. (6) permits the withholding of facts which are considered not desirable to be disclosed in the public interests,—the authorities are bound to disclose *all other* facts save those which are so withheld under cl. (6). As has been already explained (p. 87, *ante*), the sole test for determining, the sufficiency of the facts disclosed is the sufficiency for giving an opportunity to make representation :<sup>21a</sup>

"They are given a special privilege in respect of facts which are considered not desirable to be disclosed in public interest. As regards *the rest*, their duty is to disclose facts so as to give the detained person the earliest opportunity to make a representation against the order of detention."<sup>21a</sup>

4. While it is correct to say that the decision that further particulars cannot be furnished to the detenu without prejudice to the public interest must be taken by the detaining authority at the time when the grounds are furnished, there is no obligation on his part to communicate to the detenu that such a decision has been taken, unless the detenu, feeling the grounds to be vague, asks for further particulars.<sup>21</sup>

#### Cl. (7): Power of Parliament.

In exercise of the power conferred by the present clause, Parliament has enacted the Preventive Detention Act 1950 and the subsequent Amendment Acts :<sup>22</sup>

#### PREVENTIVE DETENTION ACT, 1950 (IV OF 1950), AS AMENDED BY ACTS L OF 1950, IV OF 1951, LXI OF 1952, AND ACT 54 OF 1957.

*An Act to provide for preventive detention in certain cases and matters connected therewith.*

Be it enacted by Parliament as follows :—

1. **Short title, extent and duration.**—(1) This Act may be called the Preventive Detention Act, 1950.

(2) It extends to the whole of India :

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to preventive detention for reasons connected with defence, foreign affairs or the security of India.

<sup>21a</sup> *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

<sup>22</sup> Not only have the rigours of this drastic power been mitigated by the conditions imposed by such legislation, the use of the power has also been less frequent of late. Thus, at the end of 1958, there were some 72 persons detained under the Act in the whole of India.

(3) It shall cease to have effect on the 31st day of December, 1960<sup>23</sup> save as respects things done or omitted to be done before that date.

**2. Definition**—In this Act, unless the context otherwise requires,—

(a) "State Government" means in relation to a Union Territory, the Chief Commissioner of the State;

(b) "detention order" means an order made under section 3; and

(c) "appropriate Government" means, as respects a detention order made by the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer subordinate to a State Government or as respects a person detained under such order, the State Government.

**3. Power to make orders detaining certain persons.**—(1) The Central Government<sup>24</sup> or the State Government<sup>24</sup> may—

(a) if satisfied<sup>25</sup> with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relation of India with foreign powers,<sup>25a</sup> or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community;<sup>26</sup> or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners' Act 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,<sup>27</sup> it is necessary so to do, make an order directing that such persons be detained.<sup>28</sup>

23. Substituted for '1957' by Act 54 of 1957.

24. Leaving the determination of the necessity for detention to the subjective satisfaction of the Executive is not delegation of legislative power. This is necessary owing to the very nature of preventive detention [*Gopalan v. State of Madras*, (1950) S.C.R. 88 (121-2)]. As to how far such satisfaction can be challenged, see p. 134, *ante*.

25. The authority making the order of detention must state in the order the fact of its satisfaction that it is necessary to make the order of detention with a view to preventing the detenu from acting in a manner prejudicial to one or more of the objects contained in one or more of the sub-clauses of s. 3 (1) [*Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1340)].

25a. This expression includes Pakistan though it is not a 'foreign State' [*Jagannath v. Union of India*, (1960) S.C. (Petn. 170/59)].

1. This 'and' has been interpreted as disjunctive [*Dayananda v. State of Bihar*, A. 1951 Pat. 47 (51)].

2. Cl. (iii) is an independent clause and is not to be read *ejusdem generis* with cl. (ii). Hence, a person may be detained for the maintenance of supplies [*e.g.*, to suppress blackmarketing or hoarding], whether there is any likelihood of public order or not [*Dayananda v. State of Bihar*, A. 1951 Pat. 47 (52)]. But adulteration of food-stuffs is not covered by 'maintenance of supplies' [*Mishrilal v. The State*, A. 1951 Pat. 134 (F.B.)].

3. Validity of s. 3 (1) (b) has been upheld in *Hans Mullar v. Supdt.*, (1955) 1 S.C.R. 1285 (1295).

4. It is contrary to the scheme of the Act that the period of detention should be specified in the initial order under s. 3, before the case was placed before the Advisory Board. If such period is fixed in the order under s. 3, it is void [*Makhan Singh v. State of Punjab*, (1952) S.C.R. 368].



(2) Any of the following officers, namely,—

(a) District Magistrates,

(b) Additional District Magistrates specially empowered in this behalf by the State Government,

(c) the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad.

(d) Collector in the State of Hyderabad,

may if satisfied as provided in sub-clauses (2) and (3) of clause (a) of sub-section (1) exercise powers conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2) he shall forthwith<sup>5</sup> report the fact to the State Government to which he is subordinate together with the grounds<sup>6</sup> on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days<sup>7</sup> after the making thereof unless in the meantime it has been approved by the State Government.

(4) When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have bearing on the necessity for the order.

**3A. Execution of detention orders.**—A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1898 (Act V of 1898).<sup>8</sup>

5. 'Forthwith' means immediately. But where owing to circumstances, not due to any act or default of the officer, the officer was not in a position to make the report to the Government, the order of detention cannot be held to be invalid for contravention of s. 3 (3). [*Keshav v. Commr. of Police*, A. 1957 S.C. 28 (32).]

6. While the object of the communication under s. 7 (1) is to enable the detenu to make a representation, the object of the report to the State or Central Government under s. 3 (3) or (4) is to enable the Government to satisfy itself whether the detention should be approved. Hence the communication under s. 3 (3) need not be a formal document like that under s. 7 (1); there is a sufficient compliance with s. 3 (3) if the materials on which the order was made are communicated to the Government [*Shamrao v. Dist. Magistrate*, A. 1957 S.C. 23].

On the other hand, the objects of the two provisions being different, the particulars communicated to the Government under s. 3 (3) or (4) may contain such details of facts as may not be communicated, in the public interest, to the person detained [*Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341)].

7. A person who is detained beyond 12 days without an order of approval of the State Government is entitled to be released forthwith [*Bhimsingh v. The State*, A. 1957 Raj. 5].

8. S. 3A does not curtail the extra-territorial jurisdiction conferred by S. 5 and does not imply that a detention order cannot be executed outside India, by virtue of an agreement or treaty with the foreign State concerned [*Gour Gopal v. Chief Secretary*, (1952) 56 C.W.N. 427 (433)].

**4. Power to regulate place and condition of detention.**—Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place<sup>a</sup> and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention whether within the same State or in another State, by order of the appropriate Government :

Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State except with the consent of the Government of that other State.

**5. Detention orders not to be invalid or inoperative on certain grounds.**—No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or officer making the order;<sup>10</sup> or

(b) that the place of detention of such person is outside the said limits.

**6. Powers in relation to absconding persons.**—(1) If the Central Government or the State Government or an officer specified in subsection (2) of section 3, as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government or officer may—

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the *Official Gazette* direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves it was not possible for him to comply therewith and that he had within the period specified

9. Failure to mention in the detention order the place where he is going to be detained does not render the order invalid. Where there is a valid order for detaining the detenu, the absence of a valid order directing his detention in a particular place would not compel the Court to release the detenu if a valid order directing that he be detained in a particular place is passed by a proper authority before his release [*Prahlad v. State of Bombay*, A. 1952 Bom. 1 (6)].

10. This section confers extra-territorial jurisdiction and authorises the making of an order of detention even though the person to be detained is outside the jurisdiction of the Government making the order,—and even when he is in foreign territory [*Gourigopal v. Chief Secretary*, (1952) 56 C.W.N. 427 (432)]. The decision in *Re Ghale* (1950) 52 Bom. L.R. 711 that a State Government cannot have an extra-territorial authority to make an order of detention against a person residing outside the State has been superseded by the amendment of s. 5 of the P. D. Act in 1951.



in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), every offence under clause (b) of sub-section (1) shall be cognizable.

**7. Grounds of order of detention to be disclosed to persons affected by the order.**—(1) When a person is detained in pursuance of a detention order, the authority making the order<sup>11</sup> shall, as soon as may be, but not later than five days from the date of detention, communicate<sup>12</sup> to him the grounds<sup>13</sup> on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.<sup>14</sup>

**8. Constitution of Advisory Boards.**—The Central Government and each State Government shall whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of three persons who are or have been or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government, as the case may be.<sup>15</sup>

11. S. 7 does not require that the communication of the grounds must be made directly by the authority making the order. The communication may be made through recognized channels prescribed by the administrative rules of business [*Ujagar v. State of Punjab*, (1950-51) C.C. 155]. Nor is there anything wrong if the order of detention is made by one District Magistrate and, on his transfer, the grounds are communicated by his successor [*In re Maganlal*, A. 1951 Bom. 33].

12. Verbal communication is not sufficient [*Inder Singh v. The State*, A. 1952 Pepsu 61]. Failure to communicate the grounds within time makes the detention illegal [*State of Bombay v. Alimaram*, A. 1951 S.C. 157].

13. 'Grounds' in this context means something more than a recital of the ground of satisfaction of the authority as contained in any of the sub-cl. of s. 3 (1) and which must be given in the order itself. The grounds contemplated by s. 7 are the conclusions of fact which have led to the passing of the order. The order of detention itself may contain such a recital also; but where it does not, s. 7 requires that within a period of 5 days from the date of detention, such conclusions of fact must be communicated to the detenu to inform him of the reasons why he was being detained. Again, if this communication does not contain all the particulars for enabling the detenu to make his representation, he may ask for further particulars and then it will be the duty of the authority to furnish such particulars except those he is entitled to withhold under s. 7 (2) [*Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341)]. Hence, a mere communication of a sub-clause of s. 3 (1) is not a sufficient compliance with the requirements of s. 7 (1) [*ibid*].

14. This sub-sec. reproduces cl. (6) of Art. 22. Where the State takes recourse to this provision, it must prove that the authority concerned was satisfied that it was not in the public interest to disclose the facts which have been withheld [*Sangappa v. State of Mysore*, A. 1959 Mys. 7]. Even where such facts are disclosed to the Advisory Board under its direction, the detenu is not entitled to have copies thereof [*Jagannath v. Union of India*, (1960) S.C. (Petn. 170/59)].

15. Proviso to s. 8 (2) omitted by Act LXI of 1952.

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a Judge of a High Court to be its Chairman, and in the case of Part C State the appointment to the Advisory Board, of any person who is a Judge of the High Court of a Part A State or a Part B State shall be with the previous approval of the State Government concerned :

*Provided that nothing in this sub-section shall affect the power of an Advisory Board constituted before the commencement of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under section 9 pending before it at such commencement."*

**9. Reference to Advisory Boards.**—*In every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board<sup>16</sup> constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer, under sub-section (3) of section 3."*

**10. Procedure of Advisory Boards.**—*(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case it considers it essential to do so or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks<sup>17</sup> from the date of detention."*

*(2) The report<sup>18</sup> of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.*

*(2A) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.*

*(3) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.*

**11. Action upon the Report of Advisory Board.**—*(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Govern-*

16. As to the scope of the Advisory Board, see under Cl. (4), p. 80, ante.

17. Substituted for s. 9 as amended in 1951, by Act LXI of 1952.

18. If the Board fails to submit its report within 10 weeks, the detenu is entitled to be set at liberty immediately thereafter [Dharam v. State of Punjab, (1958) S.C.R. 997].

19. Ss. 10-11 do not specify what the Report of the Advisory Board should contain, besides the opinion. At any rate they do not require the Board to give its reasons as in a judgment. The Court has no power to examine the contents of the report to determine whether it is a report in conformity with s. 10 (1), for, under s. 10 (3), the entire report, excepting the opinion, is confidential [Thevar v. State of Madras, A. 1958 Mad. 425].



ment may confirm the detention order<sup>20</sup> and continue the detention of the person concerned for such period as it thinks fit.<sup>21</sup>

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall<sup>22</sup> revoke the detention order and cause the person to be released forthwith.

**11A. Maximum period of detention.**—(1) The maximum period<sup>23</sup> for which any person may be detained in pursuance of any detention order which has been confirmed under section 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section (1), every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall unless a shorter period is specified in the order, continue to remain in force until the 1st day of April, 1953, or until the expiration of twelve months from the date of detention, whichever period of detention expires later.

(3) The provisions of sub-section (2) shall have effect notwithstanding anything to the contrary contained in section 3 of the Preventive Detention (Amendment) Act, 1952 (XXXIV of 1952), but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

**12. Validity and duration of detention in certain cases.**<sup>24</sup>—For the avoidance of doubt it is hereby decided that—

(a) every detention order in force at the commencement of the Preventive Detention (Amendment) Act, 1951, shall continue in force

20. There must be a formal order of confirmation and it must be made within a reasonable period from the date of receipt of the report of the Advisory Board [*Sital v. State*, A. 1952 Punj. 349], but not beyond three months from the date of detention [*Sangappa v. State of Mysore*, A. 1959 Mys. 7]. But there is nothing in the section to require the Government to communicate the order of confirmation [*Prahlad v. State of Bombay*, A. 1952 Bom. 1 : *Afsal v. State of J. & K.*, (1957) S.C.R. 63 (67)], or the report of the Advisory Board [*Sarfa v. State*, A. 1956 All. 589] to the detenu.

21. In *Krishnan v. State of Madras*, (1951) S.C.R. 621, the Supreme Court held that s. 11 (1) is not invalid on the ground that it authorises detention for an indefinite period, for, the Act itself being temporary, the detention will automatically terminate with the expiry of the Act, and in *Dattatraya v. State of Bombay* [A. 1952 S.C. 181], it was held that the period needed not be specified when confirming the detention order, Act LXI of 1952 has put a limit to detention for an indefinite period by providing, in s. 11A that when a detention order has been confirmed, the detention will terminate on the expiry of 12 months from the date of detention (unless revoked earlier). S. 11A, thus, controls s. 11(1). Nor does s. 11 (1) violate Art. 22 (4) [*Pannalal v. Union of India*, A. 1958 S.C. 163].

22. By inserting s. 11A, Act LXI of 1952, for the first time, prescribes the maximum period of detention under the P. D. Act. This is legislation in pursuance of the power conferred by Art. 22 (7) (b), p. 129, ante. S. 11A does not contravene Art. 14 of the Constitution [*Godavari v. State of Bombay*, A. 1953 S.C. 52].

23. S. 12 of the original P. D. Act, 1950 provided that there was to be no review in cases falling within s. 3 (1) (ii). The scheme of the Amendment Act of 1951 is (i) to extend the benefit of a review by advisory Board to all cases [s. 9 (1)] and (ii) to bind the detaining

and shall have effect as if it had been made under this Act as amended by the Preventive Detention (Amendment) Act, 1951; and

(b) nothing contained in sub-section (3) of section 1 or sub-section (1) of section 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order.

**13. Revocation of detention orders.**—(1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897 (X of 1897), a detention order may at any time be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in the sub-section (2) of section 3, by the State Government to which that officer is subordinate or by the Central Government; and

(b) notwithstanding that the order has been made by a State Government or by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made.<sup>24</sup>

**14. Temporary release of persons detained.**—(1) The appropriate Government may at any time direct that any person detained in pursuance of detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may at any time cancel his release.

(2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

**15. Protection of action taken under the Act.**—No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

authorities to act in conformity with the report of the Board [s. 11 (2)] —(*Krishnan v. State of Madras*, (1951) S.C.R. 621.) S. 12, read with s. 9 (2) (a) has been held to be valid as being a law 'substantially' in accordance with sub-cl. (a) and (b) of cl. (7) of Art. 22 of the Constitution [*Krishnan v. State of Madras*, (1951) S.C.R. 621].

24. The above sub-section was substituted by Act LXI of 1952 for the original s. 13 (2) which was as follows:

"The revocation of a detention order shall not bar the making of a fresh detention order under s. 3 against the same person."

It would, accordingly, seem that the intention of the Legislature behind the amendment is to confine the making of a fresh order to the case where there are fresh facts justifying the fresh order.

This sub-section also overrides the decision in *Dattatraya v. State of Bombay*, A. 1952 S.C. 181, to the effect that the detaining authority may extend the period of detention, from time to time, subject to the over-all limit of duration of the Act itself.



*Right against Exploitation*

23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Prohibition of traffic in human beings and forced labour.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

**Art. 23: Prohibition of traffic in human beings.**

This Article prohibits traffic in human beings and all forms of forced labour but authorises the State to impose compulsory service for 'public purposes'.

Cl. (1): 'Traffic in human beings', obviously, includes traffic in women and children.<sup>25</sup> A law for the suppression of such traffic would be valid by reason of the present Article even though it may restrict the freedom of business and profession guaranteed by Art. 19 (1) (g).<sup>1</sup>

**'Forced Labour'.**

There is no *begar* or forced labour within the inhibition of Art. 23 where the Petitioners had voluntarily agreed to do extra work by entering into a contract for additional remuneration and other benefits.<sup>2</sup>

**Cl. (2): 'Public Purposes'.**

The expression 'public purposes' is wide enough to include not only military<sup>3</sup> and police services<sup>4</sup> but also other social purposes.

24. No child below the age of fourteen years shall be

Prohibition of employment of children in factories, etc. employed to work in any factory or mine or engaged in any other hazardous employment.

*Right to Freedom of Religion*

25. (1) Subject to public order, morality and health

Freedom of conscience and free profession, practice and propagation of religion. and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

25. *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

1. *Shama v. State of M. P.*, A. 1959 All. 57.

2. *Dubar v. Union of India*, A. 1952 Cal. 496.

3. *State v. Jorawar*, A. 1953 H.P. 18.

4. *Dulal v. Dt. Magistrate*, A. 1958 Cal. 365 (372).

- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

### Art. 25: Freedom of conscience and religion.

This Article guarantees that a citizen shall have the freedom of conscience and shall have the right to profess, practise and propagate religion, subject to restrictions imposed by the State, on the following grounds—(i) public order, morality and health; (ii) other provisions of the Constitution; (iii) regulating non-religious activity associated with religious practice; (iv) social welfare and reform; (v) throwing open Hindu religious institutions of a public character to all classes of Hindus.

"Subject to the restriction which this Article imposes, every person has a fundamental right under *our* Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."

#### Cl. (1): 'Subject to public order'.

The freedom of religion is subject to the interests of public order, so that it would not authorise the outrage of the religious feelings of another class, with a deliberate intent.<sup>5</sup>

#### 'Subject to the other provisions of this Part'.

1. The freedom guaranteed by cl. (1) is subject to the power conferred upon the State by cl. (b) of this Article.<sup>6</sup>

2. Since the freedom guaranteed by this Article is subject to the other provisions of Part III, this Article does not exempt religious property from the power of eminent domain conferred by Art. 31 (2).<sup>7</sup>

#### 'All persons'.

The freedom of religion conferred by the present Article is not confined to citizens of India but extends to all 'persons', including aliens,<sup>8</sup> and individuals exercising their rights individually or through institutions.<sup>9</sup>

Hence, the head of a religious institution can complain of the infringement of the right conferred by this Article.<sup>9</sup>

5. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055; (1952-54) 2 C.C. 324 (327); A. 1954 S.C. 388.

6. Cf. *Ramji Lal v. State of U.P.*, A. 1957 S.C. 630.

7. *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (267).

8. *Suryapalsingh v. State of U.P.*, (1952) S.C.R. 1056 (1060).

9. *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005; (1952-54) 2 C.C. 191.



### 'To profess and practice'.

Freedom of conscience would be meaningless unless it were supplemented by the freedom of unhampered expression of spiritual conviction in word and action. Matters of conscience come in contact with the State only when they become articulate. While freedom of 'profession' means the right of the believer to state his creed in public, freedom of practice means his right to give it expression in forms of private and public worship.<sup>10</sup>

From this right would follow the right to take out a religious procession, subject to restrictions imposed in the interests of preventing a breach of the peace or obstruction of the thoroughfare.<sup>11</sup>

### 'Religion'.

1. Arts. 25 and 26 guarantee the right to practise and propagate not only matters of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of that religion.<sup>12</sup>

2. Of course, religion is a matter of faith but is not necessarily atheistic and there are well-known religions in India like Buddhism and Jainism who do not believe in God. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine of belief.<sup>13</sup>

"A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."<sup>14</sup>

"Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines."<sup>15</sup>

3. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.<sup>16</sup>

### Illustrations.

If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b).<sup>17</sup>

10. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191; (1954) S.C.R. 1005.

11. *Siddiqui v. State of U. P.*, A. 1954 All. 756; *Manzur v. Zaman*, A. 1925 P.C. 36.

12. *Quareshi v. State of Bihar*, A. 1958 S.C. 731 (739) : (1959) S.C.R. 629.

13. *Venkataramana v. State of Mysore*, (1958) S.C.R. 895 : A. 1958 S.C. 285.

On the other hand—

(a) The sacrifice of a cow is not an obligatory overt act enjoined by the Muslim religion.<sup>14</sup>

(b) The right to elect members to a Committee for the administration of Gurudwara property cannot be said to be a matter of religion for the Sikhs.<sup>15</sup>

(c) A power given to the Board of Religious Trusts to modify the Budget relating to a trust or to give directions to the trustee, in order to carry out the wishes of the founder of the trust (in so far as it is not repugnant to the law governing such trusts, cannot be said to be an interference with the freedom of due observance of religious practices in the *math* or temple concerned.<sup>16</sup>

(d) Marrying a second wife during the lifetime of the first wife cannot be said to be an integral part of the Hindu<sup>17a</sup> or Muslim<sup>17b</sup> religion.

#### Cl. (2) (a): Scope of State regulation.

"What sub-cl. (a) of cl. (2) contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices."<sup>18</sup>

#### Cl. (2) (b): Social Reform.

'Social reform' means eradication of practices or dogmas which stand in the way of the country's progress as a whole but do not form the essence of religion. Thus, the State may prohibit bigamy amongst the Hindus because the need of having a natural son by marrying a second wife on the failure of the first wife to get a son was not of the essence of Hindu religious belief, as the purpose might be served by taking an adopted son.<sup>19</sup> Similarly, the prevention of excommunication is a social reform.<sup>20</sup>

#### 'Throwing open of Hindu religious institutions . . .'

1. The right conferred by this clause is not of an absolute character. It is a right of every member of the Hindu public to enter into a public temple for worship. It does not, however, mean that such temple must be kept open *at all hours* or that any member of the Hindu public must be allowed to perform *those services* which are open only to those specially initiated according to the ceremonial law governing the temple.<sup>21</sup>

2. Art. 25 (2) (b) must be read along with Art. 26 (b), without rendering the latter nugatory.<sup>22</sup>

3. The present clause applies only to institutions of a 'public' character, which, however, include temples founded for the benefit of particular sections of the Hindus, as referred to in Art. 26. Hence, though under Art. 26 (b) the trustees of a Hindu denominational temple would be entitled to exclude people of other sections according to the ceremonial law of that temple, the State may override that right by

14. *Quareshi v. State of Bihar*, (1950) S.C.R. 620.

15. *Sarup v. State of Punjab*, A. 1959 S.C. 800 (866).

16. *Moti Das v. Sahi*, A. 1959 S.C. 942 (949).

16a. *Ramprasad v. State of U. P.*, A. 1957 All. 411.

16b. *Badruddeen v. Aisha*, (1957) A.L.J. 300.

17. *Ratilal v. State of Bombay*, (1954) S.C.R. 1055 : A. 1954 S.C. 388.

18. *Srinivas v. Saraswathi*, A. 1952 Mad. 193 (196).

19. *Saifuddin v. Tyebji*, A. 1953 Bom. 183.



enacting a law under the present clause,—in which case any member of the Hindu public would have a right to enter the temple for worship.<sup>20</sup>

*Explanation 1* specifically guarantees the right of a Sikh to carry a 'kirpan' as a part of the profession of his religion. But neither the Sikh religion nor Art. 25 entitles a Sikh to possess without licence, more than one kirpan or sword.<sup>21</sup>

**26.** Subject to public order, morality and health, every Freedom to ma- religious denomination or any section there-  
nage religious affairs. of shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes ;
- (b) to manage its own affairs in matters of religion ;
- (c) to own and acquire movable and immovable property ; and
- (d) to administer such property in accordance with law.

**Art. 26: Rights of religious denomination.**

1. This Article guarantees certain rights to every religious denomination, subject to 'public order, morality and health', and the rights are capable of being enforced by or on behalf of a denomination.<sup>22</sup>

2. The word "denomination" has been defined to mean "a collection of individuals classed together under the same name; a religious sect or body having a common faith and organisation and designated by a distinctive name."<sup>23</sup> The Article contemplates not only a religious denomination but also a section thereof; hence, a Math is a religious denomination with the meaning of Art. 26.<sup>24</sup> Similar is the Gowda Saraswat Brahmin Community;<sup>25</sup> <sup>26</sup> followers of the Zoroastrian religion.

**Cl. (b) : Right to manage own affairs in matters of religion.**

1. This clause guarantees to each religious denomination the right to manage its domestic affairs in matters which are concerned with religion and the State cannot interfere in these affairs unless the denomination so exercises its right as to interfere with public order, morality or health.

2. While the right to administer property under cl. (d) is subject to be regulated by laws, the right to manage religious affairs under cl. (b) cannot be regulated by the Legislature<sup>27</sup> except on the ground of 'public order, morality or health';<sup>28</sup> or to enforce the purposes of the trust itself.<sup>29</sup>

3. This right of management includes—

(a) complete autonomy to decide what rites and observances are essential according to its religion, though the secular aspects, e.g., the scale of expenses to be incurred in connection with such observances, may be regulated by the competent legislature;<sup>30</sup>

(b) the right to spend the trust property or its income for religion and religious purposes and objects indicated by the founder or estab-

20. *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 : (1958) S.C.R. 895.

21. *R. v. Dhyani Singh*, A. 1951 All. 53.

22. *Devaraja v. State of Madras*, A. 1953 Mad. 149.

23. *Commr., H. R. E. v. Lakshmindra*, (1952-54) 2 C.C. 191 (197) : (1954) S.C.R. 1005.

24. *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 : (1958) S.C.R. 895.

25. *Sarup Singh v. State of Punjab*, (1960) 1 S.C.A. 163 (174).

1. *Moti Das v. Sohl*, A. 1959 S.C. 942 (950).

lished by usage obtaining in a particular institution. To divert the trust property or funds to other purposes, although the original objects of the founder can still be carried out, is an unwarrantable encroachment upon the right guaranteed to a religious institution by this clause,<sup>1</sup> even though such other purposes are 'charitable'.<sup>2</sup>

But there is no contravention of cl. (b) where the law seeks to implement the purposes of the trust itself and to prevent mismanagement and waste by the trustee.<sup>4</sup>

### 'Matters of religion'.

1. 'Religion', in this contest, is not confined to religious belief but includes the practices which are regarded by the community as part of its religion.<sup>3, 4</sup> [See p. 153, *ante*].

2. Each religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold.<sup>5</sup> But the Court has the right to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion.<sup>7</sup> Thus, the following have been held *not* to be essential to the relevant religions :

(i) The sacrifice of a cow, in relation to the Muslim religion.<sup>1</sup>

(ii) The *mode* of representation to the Board for management of a Sikh Gurudwara<sup>8</sup> even though the right of the Sikh community to be represented on the Board may be.<sup>9</sup>

Where the Board consists exclusively of Sikh members, the fact that the electorate for electing such members included certain non-Sikh members is far too remote and indirect to constitute an infringement of the right guaranteed by Art. 26 (b).<sup>4</sup>

(iii) Where a religious denomination seeks to deprive a member of his legal rights and privileges, *e.g.*, to expel or excommunicate him, it cannot be said to be managing its own affairs in matters of religion, for religion has nothing to do with excommunication or expulsion. Such a right cannot be claimed under Art. 26.<sup>6</sup>

On the other hand—

According to the ceremonial law relating to temples, the persons who are entitled to enter into them for worship,<sup>10</sup> where they are entitled to stand,<sup>11</sup> the hours when the public are to be admitted, how the worship is to be conducted,<sup>12</sup> are all matters of religion.

### Cl. (c): Right to own property.

This clause confers on every religious denomination the right to own and acquire property but does not prevent property belonging to a religious body being acquired by authority of law.<sup>13</sup>

### Cl. (d): Right to administer property.

1. Under the present clause, a religious denomination is entitled to own, and acquire, and has the right to administer the property, but

2. *Rafilal v. State of Bombay*, (1954) S.C.R. 1055 : (1952-54) C.C. 324 (330); A. 1954 S.C. 388.

3. *Ram v. State of Orissa*, A. 1959 Orissa 5 (16).

4. *Moti Das v. Sahi*, A. 1959 S.C. 942 (950).

5. *Sarup Singh v. State of Punjab*, (1960) 1 S.C.A. 163 (179).

6. *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 : (1958) S.C.R. 895.

7. *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

8. *Saifuddin v. Tyebji*, A. 1953 Bom. 183.

9a. *Suryapal v. State of U. P.*, (1952) S.C.R. 1056 : (1952-4) 2 C.C. 396 (412).



only in accordance with law. This means that the State can regulate the administration of trust properties by means of law validly enacted but here again, it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26 (d) of the Constitution.<sup>8b</sup>

2. Regulation by the State, again, cannot interfere with things which are essentially religious.<sup>9</sup>

A religion is not merely an opinion, doctrine or belief. It has its outward expressions in acts as well. Religious practices or performances of acts in pursuance of religious belief are as much part of religion as faith or belief in particular doctrines. No outside authority has any right to say that religious rites and ceremonies to be performed at certain times and in a particular manner are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. The scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to a religious institution, and if the expenses on these are likely to deplete the endowed properties or affect the stability of the institution, proper control can be exercised by State agencies as the law provides. This is the measure of protection afforded by Art. 26 (d) of the Constitution.<sup>9</sup>

## 27. No person shall be compelled to

Freedom as to payment of taxes for promotion of any particular religion. pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

### Art. 27: No taxation for purposes of religion.

1. What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religious denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denominations.<sup>10</sup>

2. It does not prohibit the levy of a 'fee' for the defraying of expenses of the State for regulating the secular administration of religious institutions. Art. 27 is not attracted to such a case as there is no question of favouring any particular religion or religious denomination, by such imposition.<sup>10b, 11</sup>

<sup>8b</sup> *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005 : (1952-4) 2 C.C. 191 (199) : (1954) S.C.R. 1005.

<sup>9</sup> *Ratilal v. State of Bombay*, (1952-54) 2 C.C. 324 : (1954) S.C.R. 1055.

<sup>10</sup> *Moti Das v. Sahi*, A. 1959 S.C. 942 (950).

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

'Religious instruction'.—What is prohibited is religious, not moral education, dissociated from any denominational doctrines.<sup>11</sup>

### *Cultural and Educational Rights*

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

Protection of interests of minorities.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### **Cl. (1): Protection of cultural rights of minorities.**

1. This clause means that if there is a 'cultural' minority which wants to preserve its language, script and culture, the State shall not impose upon it any other culture which may be local or otherwise.

2. Where a law passed by a State Legislature extends to the whole of the State, the 'minority' must be determined with reference to the population of the entire State.<sup>12</sup>

3. A minority community can effectively conserve its language etc. only through educational institutions. The right to establish and maintain educational institutions of its choice is a necessary concomitant of the right conferred by cl. (1). This right is, however, subject to the limitation in cl. (2), if such institution receives State aid.<sup>12</sup>

#### **Object of Cl. (2).**

1. This clause is a counterpart of the equality clauses of Art. 15. There should be no discrimination against any citizen on the ground of religion, etc., in the matter of admission into any educational institution maintained or aided by the State.

2. While cl. (1) protects the rights of a section of the citizens, the right conferred by cl. (2) is an individual right given to the citizen as

11. *Nambudripad v. State of Madras*, A. 1954 Mad. 385.

12. Kerala Education Bill, *in re*, A. 1958 S.C. 956.



such and not as a member of any community. The present clause gives an aggrieved person, who has been *denied* admission on the ground of his religion etc., a remedy even though other members of his religion, etc., have been admitted. If a citizen who seeks admission into any such educational institutions has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under Art. 29 (2). But, on the other hand, if he has the academic qualifications but is refused admission *only* on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right under the present clause.<sup>13</sup>

3. This clause offers protection to all citizens, whether they belong to majority or minority groups.<sup>14</sup>

### 'Aid'.

The word 'aid' not having been defined in the Constitution, must be taken in its ordinary meaning and will, accordingly, include the 'grant' given to Anglo-Indian institutions under Art. 337.<sup>15</sup>

### 'Only of religion, race, caste, language'.

These words show that the educational institutions coming within this clause are not debarred from imposing conditions or limitations other than those specified, such as previous training, age, physical fitness, vaccination, dissociation from injurious associations and the like.

(i) Compared with Art. 15 (1), it appears that 'sex' and 'place of birth' are omitted from Art. 29 (2). Hence, educational institutions intended exclusively for men or women could be maintained by the State without a violation of the Constitution. Similarly, reservation of seats for residents of a particular area has been upheld.<sup>16</sup>

(ii) The Article does not take away the right of an institution to refuse admission or to expel<sup>17</sup> a student on the ground of indiscipline or the like, provided the discretion is not abused.

### Arts. 15 (1) and 29 (2).

While Art. 15 (1) is a protection against discrimination generally, Art. 29 (2) offers protection against a particular species of wrong, namely, the denial of admission into educational institutions maintained or aided by the State.<sup>18</sup> While Art. 15 (1) is available against the State, Art. 29 (2) extends against the State or anybody who denies the right conferred by it.<sup>19</sup>

### Art. 15 (4) and 29 (2): Right of backward classes to admission to educational institutions.

1. Under Art. 15 (4), the State is entitled to reserve a *minimum* number of seats for members of the backward classes.<sup>20</sup>

13. *State of Madras v. Champakam*, (1951) S.C.R. 525 : (1950-51) C.C. 183.

14. *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568 : (1952-4) 2 C.C. 336 (340).

15. *Cf. Anjali v. State of W. Bengal*, (1953) 56 C.W.N. 801 (811) : A. 1952 Cal. 822.

16. *Joseph v. State of Kerala*, A. 1958 Ker. 33 (35).

17. *Ramesh v. B. B. Intermediate College*, A. 1953 All. 90.

18. The observation in *Anjali v. State of W. B.*, A. 1952 Cal. 822 that Art. 29 (2) is controlled by Art. 15 (1) is not tenable in view of the S.C. decision.

19. *Raghu Ramulu v. State of A. P.*, A. 1958 A.P. 129.

2. But a provision fixing a *maximum* number or percentage of seats for members of backward classes, which would prevent boys belonging to such classes, even if they secure more than the specified number of seats by their merit in the general competition, would offend against Art. 29 (2),<sup>20,21</sup> which guarantees a right to admission to all citizens, whether belonging to the backward classes or not without being discriminated against on grounds of religion, race, caste etc.

3. A proper way of reconciling the provisions of Arts. 15 (4) and 29 (2) would be to pool all the candidates (backward class or otherwise) together and then guaranteeing minimum seats for those belonging to the backward classes. Thus,

If there are 100 applicants, they would be arranged in order of merit on the results of a general competition and if more than the quota reserved for the backward classes (say, 15%), could be selected *on merit* alone, they would be so selected.

If, however, out of these who succeed on merit, the number of backward candidates falls short of 15%, the deficiency would be filled up by selecting (on the basis of merit) from amongst the other backward candidates down in the list, even though secure less marks than boys belonging to the other communities, who cannot be admitted.<sup>22</sup>

But a candidate of the backward class, who fails to secure a seat in the general competition and also to secure a reserved seat (being in excess of the 15%), has no fundamental right to admission under either Article.<sup>23</sup>

#### Art. 29 (2) and Proviso 2 to Art. 337.

It is in conformity with the right given to every citizen not to be denied admission in any aided institution on grounds of religion etc. that it is provided in the 2nd Prov. to Art. 337 that an Anglo-Indian educational institution may receive grant under that Article only if 40% of the annual admission in such institution is reserved for members of communities other than the Anglo-Indian community.<sup>24</sup>

**30. (1)** All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

Right of minorities to establish and administer educational institutions.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

#### Cl. (1): Right of minorities to establish educational institutions.

1. Cl. (1) implies the right of a minority community to impart instruction to the children of its own community in institutions run by it and in its own language and if such right is infringed, an institution run by the community may seek relief for violation of the fundamental right.<sup>25</sup>

2. Even though Hindi is the national language of India and Art. 351 provides a special directive upon the State to promote the spread

20. *Raghu Ramulu v. State of A. P.*, A. 1958 A.P. 129.

21. *Sudarsan v. State of A. P.*, A. 1958 A.P. 569 (571).

22. Ref. on the Kerala Education Bill, A. 1958 S.C. 956.

23. *State of Bombay v. Bombay Education Society*, (1952-4) 2 C.C. 336 : A. 1954 S.C. 561.



of Hindi, nevertheless, the object cannot be achieved by any means which contravenes the rights guaranteed by Art. 29 or 30.<sup>24</sup>

3. The power of the State to determine the medium of instruction must yield to the fundamental right of a minority community to impart instruction in their own language.<sup>24</sup>

4. It confers two rights—(a) the right to establish an institution; (b) the right to administer it.<sup>24</sup>

#### Conditions for the application of Cl. (1).

1. In order to claim the benefit of Art. 30 (1), the community must establish (a) that it is a religious or linguistic minority and (b) that the institution was established by it. Without establishing these two conditions, it cannot claim the guarantee right to administer it.<sup>25a</sup> If these two conditions are satisfied, the right extends to institutions established prior to the Constitution as to those established after its commencement.<sup>24</sup>

2. In the case of the right to establish such institution must, of course, be sought to be exercised after the commencement of the Constitution.<sup>24</sup>

3. But in the case of neither of the two rights coming under cl. (1) is it necessary that the educational institution must be for the benefit of the minority community exclusively or that not a single member of a non-minority community must be admitted into it.<sup>24</sup>

#### Ambit of the right conferred by Cl. (1).

1. The key to the understanding of the meaning of the clause is the expression 'of their own choice' and the content of the clause is as well as the choice of the particular community may make it.<sup>24</sup>

2. It follows that in order to claim the right conferred by the clause it is not necessary that the curriculum of the institution must be confined to the teaching of religion only or of the language of the minority community. There is no limitation on the subjects to be taught at such institution, and they are not debarred from giving general education as well as such institution.<sup>24</sup>

#### Limits to the right under Cl. (1).

1. Though apparently there is no limitation imposed upon the right conferred by Art. 30 (1), it does not follow that the right is absolute in the sense that the State shall have no right to regulate the administration of the institutions established by the minority communities. Some of the limitations are inherent in the right itself. Thus, the right to administer cannot obviously include the right to maladminister.<sup>24</sup> Thus, as a condition for granting air or recognition to an institution coming under Art. 30 (1), the State may impose reasonable regulations for the purpose of ensuring sanitation, competence of teachers, maintenance of discipline<sup>25b</sup> and the like.<sup>24</sup> But the regulation cannot go to the extent of virtually annihilating the right guaranteed by Art. 30 (1).<sup>24</sup>

2. Hence, even though there is no constitutional right to receive State aid outside Art. 337, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would virtually, deprive the members of a religious or linguistic community of their right under Art. 30 (1). It

24. *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568.

25. Ref. on Kerala Education Bill, A. 1958 S.C. 956.

25a. *Ramanikanta v. Gauhati University*, A. 1951 Assam 163.

25b. *A. P. Subba v. State of Bihar*, A. 1958 Pat. 359 (365).

cannot be held that the right under Art. 30 (1) is available only so long as the community is in a position to run the institution with its own resources and that if they seek State aid, they must submit to any terms which the State may impose. While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guaranteed by Art. 30 (1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the State.<sup>1</sup> Thus, the State cannot prescribe that if an institution, including one entitled to the protection of Art. 30 (1), seeks to receive State aid, it must submit to the condition that the State may take over the management of the institution or to acquire it, under certain condition,—for such condition would completely destroy the right of the community to administer the institution.<sup>1</sup>

3. Similarly, in the matter of the right to establish in relation to recognition of an institution by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving State recognition, e.g., as to the qualifications of teachers to be employed by the institution, the State cannot impose conditions the acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30 (1).<sup>1</sup>

Where, therefore, the State regulations debar scholars of unrecognised educational institutions from receiving higher education or for entering into the public services, the right to establish an institution under Art. 30 (1) cannot be effectively exercised without obtaining State recognition. In such circumstances, the State cannot impose it as a condition precedent to State recognition that the institution must not receive any fees for tuition in the primary classes. For, if there is no provision in the State law or regulation as to how this financial loss is to be recouped, institutions solely or primarily dependent upon the fees charged in the primary classes cannot exist at all. Such a condition would thus be void for contravention of Art. 30 (1).<sup>2</sup>

4. For the same reason, it is not competent for the State to remove the trustees of a denominational school and appoint an *ad hoc* committee for the management thereof.<sup>3</sup>

1. Ref. on the Kerala Education Bill, A. 1958 S.C. 956. [Venkatarama Aiyar J., *dissenting*, held that no right to recognition is implied in Art. 20 (1) and that, accordingly, the State could impose any terms for recognition by the State, without violating Art. 30 (1)].

2. Ref. on the Kerala Education Bill, A. 1958 S.C. 956. [According to Venkatarama Aiyar J. (*dissenting*), such a view would place the minorities in a more favoured position than the majority communities and would render Art. 45 a dead letter for, while a prohibition to charge fees in the primary classes would be void as regards institutions established by the minority communities, such a prohibition would be valid as regards those established by the majority communities, and if such a prohibition could not be enforced against institutions of minority communities by way of condition for State recognition or State aid, there was no other way of introducing free primary education in such institutions. As regards the argument that such prohibition would compel the minority institutions to close down, Venkatarama J. expressed the view that it was possible for the minority communities to run their institutions by means of voluntary subscriptions, and if there was no fundamental right to receive State aid or State recognition, such prohibition could not be held to be violative of Art. 30 (1). It may be expected that questions like these will receive further consideration when some litigation *inter partes* under Art. 30 (1) comes before the Supreme Court in future].

3. *A. P. Subba v. State of Bihar*, A. 1958 Pat. 359 (365)



**'Minority'.**

The word 'minority' is not defined in the Constitution. According to the popular sense of the term, therefore, it should refer to any community which is numerically less than 50% of the population of the State concerned, when the law which is impugned as violating Art. 30 is a State law, applicable to the territory of the State as a whole. It is not correct to hold that it refers only to such communities as are in a numerical minority in that particular area or region where the educational institution involved is situated.<sup>4</sup>

**'The right to establish'.**

This expression has to be interpreted in harmony with the substance of the right conferred by the Article. While Art. 29 (1) gives a minority community the right to conserve its language or cultures, Art. 30 (1) confers on a religious or linguistic minority to establish educational institutions of their own choice, for, it is through the education of the children that the group culture can be maintained. But the scope and object of Art. 30 (1) is wider than the mere conservation of the culture, script etc., which is indicated by the word 'choice'. The right is to establish institutions which will effectively serve the needs of the community and the scholars who resort to such institutions. The right would be nugatory if the scholars of such institutions are debarred from the opportunities for higher education or for a useful career in life.<sup>4</sup>

**Arts. 29 and 30.**

1. The right conferred by cl. (1) of Art. 30 is complementary to the right guaranteed by cl. (1) of Art. 29 because a minority can effectively conserve its language etc. only if it has the right to establish educational institutions of its choice.<sup>4</sup>

2. On the other hand, the right conferred by Art. 30 (1) is subject to the limitation imposed by Art. 29 (2), so that if a minority institution receives State aid, it cannot deny admission to such institution to any person outside that minority community only on ground of religion, caste etc.<sup>4</sup>

**Art. 30 (1) and the Directive Principles.**

Though a Directive principle cannot override a fundamental right, an attempt should be made to give effect to both if that be possible. An attempt should, therefore, be made to reconcile the right of the minority community to establish and administer educational institutions on its own and the duty of the State to promote education and to introduce free and compulsory education under the Directives in Arts. 41, 45 and 40.

Thus, while the State has a solemn obligation to introduce free and compulsory education, it is possible for the State to discharge that obligation through State owned or State aided schools and Art. 45 does not require that obligation to be discharged at the expense of the minority communities, by acquiring or taking over the management of schools established by the minority communities which they have the right to administer under Art. 30 (1).<sup>4</sup>

4. Reference on the Kerala Education Bill, A. 1958 S.C. 956 (1976).

*Right to Property*

31. (1) No person shall be deprived of his property save by authority of law.

Compulsory acquisition of property.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law<sup>5</sup> which provides for compensation for the property so acquired or requisitioned<sup>6</sup> and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.<sup>6</sup>

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.<sup>6</sup>

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement, entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

5. Amended by the Constitution (Fourth Amendment) Act, 1955.

6. Added by the Constitution (Fourth Amendment) Act, 1955.



(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

**Amendment.**—Cl. (2) has been amended and cl. (2A) has been inserted by the Constitution (Fourth Amendment) Act, 1955.

### Objects of Amendment.

(A) Cl. (2).

(a) The amendment in the first part of the clause is somewhat verbal. This has been made in order to distinguish the scope of cl. (2) from cl. (1) which had been blurred by the interpretation given by the Supreme Court in the cases of *Subodh Gopal*<sup>7</sup> and *Dwarkadas*<sup>8</sup> that the two clauses relate to the same subject.

(b) The italicised words at the end of the clause have been inserted on the recommendation of the Select Committee—

"The Committee feels that although in all cases falling within the proposed clause (2) of Art. 31 compensation should be provided, the quantum of compensation should be left to be determined by the legislature, and it should not be open to the courts to go into the question on the ground that the compensation provided by it is not adequate".

(B) Cl. (2A).—This clause has been inserted with a view to supersede the decisions in the cases of *Subodh Gopal*,<sup>7</sup> *Dwarkadas*<sup>8</sup> and *Saghir Ahmed*.<sup>9</sup> It will no longer be possible for the Courts to take any extended view of the 'acquisition' as was taken in the above cases. The words 'taking possession of' in cl. (2) have also been substituted by the word 'requisitioned' with the same object.

### Effects of amendment.

(A) Cl. (2).—The changes introduced in this clause are—

(i) The words 'movable or immovable', which were a surplusage, have been omitted. The generic word 'property' would include all species of property.

(ii) The words 'including any interest in, or in any company owning, any commercial or industrial undertaking' have been omitted, for, these interests are taken to have been included in the word 'property'.

(iii) In place of the words 'taken possession of or acquired' the word "compulsorily acquired or requisitioned" have been substituted, and an explanation of the words 'acquired and requisitioned' have been provided in cl. (2A). All this has been done in order to override the extended meaning given to the original words in the cases of *Subodh Gopal*<sup>7</sup> and *Dwarkadas*.<sup>8</sup>

7. *State of W. Bengal v. Subodh Gopal*, A. 1954 S.C. 92 : (1952-4) 2 C.C. 403.

8. *Dwarkadas v. Sholapur Spinning Co.*, A. 1954 S.C. 119 : (1952-4) 2 C.C. 420.

9. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707 : (1952-4) 2 C.C. 248.

(iv) The words 'under any law authorising the taking of such possession or such acquisition' have been substituted by the words 'save by authority of a law', in order to make the provision more explicit.

(v) The words "and no such . . . adequate" have been added at the end of cl. (2) in order to make the question of adequacy of the compensation provided by the law, non-justiciable.

(B) Cl. (2A).—Cl. (2A) now completely excludes the possibility of importing the *American* doctrine of 'taking' in the matter of interpreting Art. 31 of our Constitution. The obligation to pay compensation under cl. (2) will no longer arise unless either the ownership or the right to possession of the individual is *transferred* to the State or to a corporation owned or controlled by it.

The following consequences, accordingly, emerge—

(a) To determine whether an obligation to pay compensation arises under Art. 31 (2), it will no longer be relevant to enquire whether the individual has been 'substantially dispossessed' or whether his right to use and enjoy the property has been 'seriously impaired' or the value of the property has been 'materially reduced' by the impugned State action.

(b) The new cl. (2A) not only explains cl. (2) but also differentiates the scope of cl. (1). It will no longer be possible to contend that cls. (1) and (2) relate to the same subject and that they are co-extensive. While all cases of 'deprivation' are included within the purview of cl. (1), the cases of *acquisition* and *requisition*, involving transference of ownership or right to possession to the State, are specifically dealt with in cl. (2) and no other mode of deprivation can, accordingly, be held to attract the operation of cl. (2).

No liability for compensation can, accordingly, arise not only in cases of regulation or restriction of the rights of ownership, however substantial it may be, or in cases of harm or injury caused to the proprietary rights of an individual owing to the exercise by the State of its legitimate powers, but also in cases of a total destruction of property without involving any transfer of dominion to the State.

It is now placed beyond doubt that the *only cases* where compensation is payable under Art. 31 are—where any property is physically or constructively *transferred* to the State or to a corporation owned or controlled by the State.

#### Amendment not retrospective.

The Fourth Constitution (Amendment) Act 1955 is, however, *not* retrospective in operation,<sup>10</sup> and the old law will, accordingly, apply to orders relating to acquisition or taking possession of property, which were made prior to the date of operation of the Fourth Constitution (Amendment) Act, *i.e.*, 27-4-55.

**Arts. 19(1) (f) and 31.**—See p. 98, *ante*.

**Arts. 31(1) and 265(1).**—See under Art. 265, *post*.

**Scope of cl. (1): No deprivation except under authority of law.**

1. This clause contains a declaration of the fundamental right in a negative form, namely, that no person shall be deprived of his property save by authority of law. In other words, the clause implies that a person may be deprived of his property, provided he is so deprived by authority of law.<sup>11</sup> This clause thus affords protection against executive<sup>12</sup> but not against legislative expropriation of pro-

10. *Cf. Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122.

11. *Shanta Devi v. Custodian of E. P.*, A. 1952 M.B. 181.

12. *Cf. Virendra v. State of U. P.*, (1955) 1 S.C.R. 415.



erty.<sup>13</sup> There cannot be an 'act of State' against a citizen and the Executive cannot deprive a citizen of his property save by authority of a law.

2. The law referred to in this clause must, of course, be a valid law.

3. Since the Constitution (Fourth Amendment) Act, 1955, it is clear that cl. (1) is the genus of which a species is referred to in cl. (2). Cl. (1) refers to deprivation of property by any mode and includes deprivation by means other than by 'acquisition' or 'requisition', e.g., destruction of a property in order to prevent a fire from spreading. Deprivation of no kind will be possible without the authority of law; that is the import of cl. (1).<sup>14</sup> Cl. (2), on the other hand, lays down the requirements to be complied with only when such law relates to 'acquisition' or 'requisitioning'.<sup>15</sup>

### 'Deprived'.

1. 'Deprivation' in cl. (1) has a wider significance than 'acquisition' or 'requisition' under cl. (2).<sup>16</sup> Deprivation of property may take place by other modes, such as destruction<sup>17</sup> or confiscation,<sup>18</sup> or revocation of a proprietary right granted by a private proprietor,<sup>19</sup> seizure of goods<sup>20</sup> or immovable property<sup>21</sup> from the possession of an individual<sup>22</sup> or assumption of control of a business,<sup>23</sup> in exercise of the 'police power' of a State. Thus, there is a 'deprivation' where a municipal authority, under statutory power, pulls down dangerous premises;<sup>24</sup> or the State directs a landlord to transfer to tenants on payment of the statutory compensation.<sup>25</sup>

2. For the purposes of cl. (1), it is not necessary that the transfer of property must be in favour of the State as distinguished from private individuals.<sup>26</sup>

3. 'Deprivation' is to be distinguished from 'restriction' (see p. 74, *ante*) of the rights following from ownership, which falls short of dispossession of the owner from those rights.<sup>27,28</sup> There would be a 'deprivation' within the meaning of Art. 31 (1) if a substantial bulk<sup>29</sup> of the rights constituting property is taken away, e.g., where the right to occupy, transfer, assign or sublet is taken away from a leasehold interest.<sup>30</sup>

4. But there is no deprivation—

(a) Where the State simply refuses to recognise a contract to which it is not a party.<sup>31,32</sup>

(b) By reason of taxation which is outside the scope of Art. 31 (1) and comes under the specific provision of Art. 265.<sup>33</sup>

'Property'—See under cl. (2), *below*.

13. *Chitranjit Lal v. Union of India*, (1950) S.C.R. 869 (925).

14. *Dwarkadas v. Sholapur Co.*, A. 1951 Bom. 86.

15. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919.

16. *Virendra v. State of U. P.*, (1952-4) 2 C.C. 347 (348) : (1955) 1 S.C.R. 415.

17. *Wazir v. State of H. P.*, (1952-4) 2 C.C. 344 : (1955) 1 S.C.R. 408.

18. *Nathubhai v. Municipal Corpn.*, A. 1950 Bom. 332 (338).

19. *Vajrapuri v. New Theatres*, (1959) 2 M.L.J. 469 (473).

20. *Chitranjit Lal v. Union of India*, A. 1951 S.C. 41 (55-6).

21. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (780).

22. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919.

23. *Shantabai v. State of Bombay*, A. 1958 S.C. 532 (533) : (1959) S.C.R. 265.

24. *Ramjilal v. J. T. O.*, (1950-51) C.C. 242 (244) : (1951) S.C.R. 127.

**'Save by authority of law'.**

Under the Constitution, the Executive cannot deprive a person of his property (of any kind<sup>25</sup>) without legal authority<sup>1</sup> which can be established in a court of law, however laudable motive behind such deprivation may be.<sup>2</sup>

**Scope of Cl. (2).**

Art. 31 (2) lays down two conditions subject to which the power conferred upon the State may be exercised—(a) the existence of a public purpose; (b) the payment of compensation.

**The Constitution (Fourth Amendment) Act, 1955**, has made it clear that there is no obligation to pay compensation under this clause except where property has been 'acquired' or 'requisitioned', in the manner explained in the new cl. (2A).

This Amendment has further narrowed down the scope of this clause by laying down that once the Legislature has fixed the amount of compensation or specified the principles on which the compensation is to be determined, the question of *adequacy* of the compensation so provided shall not be justiciable.

**'Property'.**

1. Property, in this Article, means only that which can by itself be acquired, disposed of or taken possession of.<sup>30</sup> Subject to this limitation,<sup>3</sup> it is designed to include private property in all its forms<sup>4</sup> and "must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its judicial or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others."<sup>5</sup>

2. 'Property' thus includes—

(a) Any proprietary interest, including a temporary or precarious interest, such as that of a mortgagee or lessee;<sup>6,7</sup>

(b) The hereditary interest in and right of management of the head of a Hindu religious endowment;<sup>8</sup>

(c) The hereditary office of a Patel or Patwari under the Berar Patels and Patwari Law, 1900.<sup>9</sup>

(d) Any interest in a commercial or industrial undertaking,<sup>10</sup> or a business,<sup>11</sup> such as managing agency.<sup>12</sup>

25. *Wazir v. State of H. P.*, (1955) 1 S.C.R. 408 : (1952-4) 2 C.C. 344 (346).

1. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415 : (1952-4) 2 C.C. 347 (352).

2. *Cf. Viro C. & P. Works v. State of M. P.*, A. 1956 Nag. 1 (5).

3. *Dwarkanadas v. Sholapur Co.*, A. 1951 Bom. 88.

4. *Commr., H. R. E. v. Lakshmindra*, (1952-4) 2 C.C. 191 (196).

5. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587 (Sastri C.J.) : A. 1954 S.C. 92.

6. *Bhagwant v. Dy. Commr.*, A. 1952 V.P. 78.

7. *Suryapal v. State of U. P.*, (1952) S.C.R. 1056.

8. *B. P. P. & P. Assn. v. State of Bombay*, A. 1958 Bom. 300 (303).

9. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.

10. *J. K. Trust v. Commr. of I. T.*, (1958) S.C.R. 65 (71, 74).



(e) A right of pre-emption conferred by Mahomedan law or by custom (as distinguished from a personal right when created by contract).<sup>11</sup>

(f) The contractual rights which a person has as share-holder of a company;<sup>12</sup>

(g) The salary earned by a Government servant;<sup>13</sup>

(h) Title acquired by adverse possession.<sup>14</sup>

3. On the other hand, no right or interest constitutes 'property' unless the law recognises it as a proprietary right.<sup>15</sup>

Hence, the following interests have been held not to constitute 'property' within the meaning of this article—

(a) The office of the managing agent of a company.<sup>16</sup>

(b) A mere chance or prospect of having particular customers.<sup>17</sup>

(c) The right to use a public highway.<sup>18</sup>

(d) The right to manufacture liquor.<sup>19</sup>

(e) A bare contractual right, unattended with any interest in property.<sup>20</sup>

(f) A grant-in-aid, until it is actually paid.<sup>21</sup>

(g) The right of a bare licensee without a grant of any proprietary interest.<sup>22</sup>

4. Nothing is property which is not capable of acquisition by itself, e.g.,—

(i) The interest of an allottee under the Evacuees Act, 1947, which arises from a statutory grant.<sup>23</sup>

(ii) The right to vote at an election.<sup>24</sup>

5. An incorporeal right which cannot be alienated apart from the corpus of the property cannot be regarded as a 'property' within the meaning of this Article, e.g.,—

(i) The right to hold a land revenue-free.<sup>25</sup>

(ii) The rights of share-holders of a company, e.g., to elect directors,<sup>26</sup> to apply for winding up.<sup>27</sup>

6. The following kinds of property cannot be subject to acquisition or requisition in view of the general principles relating to the power of 'eminent domain':

(i) Money.<sup>28</sup>

(ii) Choses in action.<sup>29</sup>

11. *Audh Behari v. Gajadhar*, (1955) 1 S.C.R. 70 (84).

12. *N. E. Corpn. v. State of Madras*, A. 1951 Mad. 979.

13. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1.

14. *Dwarkanadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674.

15. *Chettiar Farm v. Kaleeswarar Mills*, A. 1957 Mad. 309 (319).

16. *Ram Jayawa v. State of Punjab*, (1955) 2 S.C.R. 225 (242).

17. *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707.

18. *Manohar v. State of Rajasthan*, A. 1954 Raj. 85.

19. *Shantabai v. State of Bombay*, A. 1958 S.C. 532 (536) : (1959)

S.C.R. 265.

20. *Joseph v. State of Kerala*, A. 1958 Ker. 290.

21. *Rameshwar v. Commrs.*, A. 1959 S.C. 498 (503).

22. *Amar Singh v. Custodian*, A. 1957 S.C. 599.

23. *Ramdas v. State*, A. 1959 M.P. 353.

24. *Girijananda v. State of Assam*, A. 1956 Assam 33 (48).

25. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 : A. 1951 S.C. 41.

1. *Dwarkanadas v. Sholapur Co.*, A. 1954 S.C. 119 (136) : (1954) S.C.R. 674.

2. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (943).

3. *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328. [Though it is 'property' within the meaning of Art. 19 (1) (f); see p. 99, ante].

**No property exempted.**

The Article does not exempt any kind of 'property' from the power of 'eminent domain' belonging to the State.

Hence, the following kinds of property cannot claim exception—

- (i) Property already dedicated to a public use,<sup>4</sup> including religious endowments.
- (ii) The personal property of ex-Rulers of Indian States.<sup>5</sup>
- (iii) Lands held under Ghatwali tenure.<sup>6</sup>
- (iv) Crown grants.<sup>7, 8</sup>

**Cl. (2A): 'Acquisition' or 'requisitioning'.**

1. Cl. (2A), introduced by the Constitution (Fourth Amendment) Act, 1956, makes clear what is meant by acquisition or requisitioning within the meaning of cl. (2). Unless the taking of the property takes place in either of these two ways, there is no obligation to pay compensation under cl. (2).

2. The doctrine of taking by substantial abridgement of the rights of ownership of the owner, which was enunciated in the cases of *Subodh Gopal*<sup>9</sup> and *Dwarkadas*<sup>10</sup> has been superseded by this amendment.

3. In order to constitute 'acquisition', there must be a *transfer of the ownership*<sup>11</sup> in the property to the State or to a corporation owned or controlled by the State.

Thus, there is no question of Art. 31 (2) being attracted where there is no provision for transference to the State and the legislation merely enables the tenants to purchase the landlords' share without intervention of the State;<sup>12, 13</sup> or provides for the transfer of property to a statutory corporation which is not owned or controlled by the State.<sup>14</sup>

4. This does not, however, mean that Government cannot acquire part of the rights of the owner. Thus, leasehold and other similar rights can always be 'acquired' and if a person owns the totality of rights, it is not necessary to acquire the whole interest of that person if it is not needed for public purposes.<sup>4</sup> The Legislature may, thus, acquire proprietary rights of zemindars, leaving the *bhumidari* right with them.<sup>5</sup>

5. While in 'acquisition', the *ownership* or title of the owner is transferred to the State or a corporation owned or controlled by the State, 'requisition' takes place when the *right to possession* is transferred similarly, without transferring the title. In short, it must involve the

4. *Suryapal v. State of U. P.*, (1953) S.C.A. 932 (953, 963): (1952) S.C.R. 1056.

5. *Visheswar v. State of M. P.*, (1952) S.C.R. 1020 (1055).

6. *Manmohan v. State of Bihar*, A. 1955 N.U.C. (Pat.) 3984.

7. *Venkat v. State of Hyderabad*, A. 1955 Hydr. 44.

8. *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587: (1952-4) 2 C.C. 403: A. 1954 S.C. 92.

9. *Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674: (1952-4) 2 C.C. 420: A. 1954 S.C. 119.

10. *Chitranjit Lal v. Union of India*, (1950) S.C.R. 869: A. 1951 S.C. 41.

12. *Pirithi Singh v. State*, A. 1953 Pepsu 161.

13. The contrary view in *Vajrapuri v. New Theatres*, (1959) 2 M.L.J. 469 (473) really emphasises the point that such law would be a law for 'deprivation of property' within the meaning of Cl. (1) of Art. 31.

14. *Jatindra v. Jadavpur University*, A. 1960 Cal. 120 (121).



"actual taking of the property out of the possession of the owner or possessor into the possession of the State or its nominee."<sup>14</sup> While acquisition is permanent, requisition is for temporary period<sup>15</sup> and during the period when the requisitioning authority remains in possession, the rights of all other persons to enjoy the property are suspended.<sup>16</sup>

6. The Amendment makes it clear that mere 'deprivation of property', short of 'acquisition' or 'requisitioning'<sup>17</sup> within the meaning of cl. (2A), i.e., without the transfer of title or right to possession will not attract cl. (2).<sup>18</sup> Hence, there is no obligation to pay compensation in cases like the following—

(i) Where the relations between landlord and tenant are merely regulated, even though the rights of the landlord are diminished thereby.<sup>19,21</sup>

(ii) Where a private owner is affected (e.g., by the lowering of its value)<sup>22</sup> or deprived of his property by reason of the exercise of the 'police' or 'regulatory' powers of the State, e.g., where private road transport operators lose their business and their stock-in-trade is rendered useless because the State enters into the business as a monopolist and cancels the permits in favour of the existing traders,<sup>23, 24</sup> or adulterated foodstuffs are seized and destroyed or dilapidated structures are pulled down by municipal authorities or a fire brigade;<sup>25</sup> or restrictions are imposed on transfer of property by evacuees;<sup>26</sup> or goods are seized under the Sea Customs Act,<sup>1</sup> 1878, or the Foreign Exchange Regulation Act, 1947; or where the State merely exercises powers of superintendence over endowed property;<sup>1</sup> or over the affairs of a company;<sup>2</sup> or where the owners of private forests are restricted from cutting away timber without the permission of the prescribed authority;<sup>3</sup> or where the rate of interest is reduced;<sup>4</sup> or where injury is caused to adjoining land by drainage or irrigation works;<sup>5</sup> or where, under a scheme of consolidation, village land is taken from individual owners and set apart for their common use;<sup>6</sup> or where revenue free land is assessed to land revenue.<sup>7</sup>

14. Cf. *Das J. in State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587; (1952-4) 2 C.C. 403 (416).

15. *Shyam Krishan v. State of Punjab*, A. 1953 Punj. 70.

16. *Shanti v. State of W. B.*, A. 1954, Cal. 212.

17. *Santhanakrishna v. Valthilingam*, A. 1954 Mad. 51.

18. *Nageswara v. A. P. S. R. T. Corpn.*, A. 1950 S.C. 308 (3/8).

19. *Srikrishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

20. *Jageshwar v. Bircha*, A. 1956 Pat. 149 (151).

21. *Jagannath v. U. P.*, (1946) 50 C.W.N. 674 (678) P.C.

22. Cf. *Bapubhai v. State of Bombay*, A. 1956 Bom. 21 (25).

23. *Ramchandra v. State of Orissa*, (1956) S.C.R. 346 (357).

24. *State of W. B. v. Subodh Gopal*, (1952-4) 2 C.C. 403 (417); (1954) S.C.R. 587.

25. Cf. *Sadhu Ram v. Custodian*, (1956) S.C.A. 70 (73); *Shanti v. Custodian*, A. 1952 M.B. 181.

1. *Bijayananda v. State of Bihar*, A. 1954 Pat. 266.

2. *Dwarkadas v. Sholapur Spinning & Weaving Co.*, A. 1954 S.C. 119 (125).

3. *Karrar Ali v. State of U. P.*, A. 1954 All. 753.

4. *Raghubir v. Union of India*, A. 1954 Punj. 261.

5. *Sashibhusan v. State of Bihar*, A. 1956 Pat. 493 (496).

6. *Kure Singh v. State of Punjab*, A. 1956 Punj. 88; *Munsha Singh v. State of Punjab*, A. 1960 Punj. 317 (F.B.).

7. *Girijananda v. State of Assam*, A. 1958 Assam 33.

8. *Dhirendra v. State of W. B.*, A. 1956 Cal. 437.

(iii) Where the State seeks to recover possession of a land owned by it, from a lessee.<sup>9</sup>

(iv) Where the transfer of ownership is to a statutory corporation which is neither owned nor controlled by the State.<sup>10</sup>

### 'Public purpose'.

1. Though the determination by the Legislature or the Executive as to whether a particular purpose is a public purpose is *prima facie* respected by the Courts, it is the duty of the Courts to determine the question,<sup>11</sup> and the position has been made explicit by the amendment of 1954, by making the existence of a public purpose a condition precedent to acquisition under Art. 31 (2).

2. The expression 'public purpose' is not capable of a precise definition and has no rigid meaning. The definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and date of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual.<sup>12</sup>

3. The test of a public purpose is whether it is useful to the public rather than its use by the public.<sup>13</sup> If the purpose for which the acquisition is made results in benefit or advantage to the public, it is a 'public' purpose, though the acquisition may be in favour of a private corporation or of individuals. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in the improvement,<sup>12,14</sup> provided the object of acquisition advances a public purpose.<sup>15</sup>

4. A purpose which is for the benefit of individuals may still be a 'public' purpose, provided such persons are benefited not as individuals but in furtherance of a scheme of public utility.<sup>16</sup> Thus, the acquisition of lands for a society formed for construction of houses for clearing slum areas and housing poor people or in areas where there is an acute shortage of dwelling accommodation,<sup>14</sup> is a 'public purpose', even though the direct and immediate beneficiaries were the members of the society.<sup>13,17</sup> Even the allotment of requisitioned premises to informers of vacancies does not take away from the public purpose behind the requisition if the informers are homeless and are in need of accommodation.<sup>18</sup> Similarly, the excavation of an irrigation channel is a public purpose even though an adjoining private owner is immediately benefitted by it.<sup>20</sup>

5. If the object be a 'public purpose', it does not cease to be so merely because the compensation payable for the acquisition is to be paid not from the public funds but from the funds of a private society.<sup>19</sup>

9. *Jalindra v. Jadavpur University*, (1950) 63 C.W.N. 914 (917).

10. *State of Bombay v. Nanji*, (1956) S.C.R. 18.

11. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (290, 311) : (1952) S.C.R. 889.

12. *Khandewal v. State of U. P.*, A. 1955 All. 12.

13. *Thambiran v. State of Madras*, A. 1952 Mad. 756.

14. *Vajrapuri v. New Theatres*, A. 1960 Mad. 108 (113).

15. Cf. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 : (1952-4) 2 C.C. 436 (438).

16. *Bhagwat v. Union of India*, A. 1950 Punj. 544 (551).

20. *Gundachar v. State of Madras*, A. 1953 Mad. 537.



6. Implementation of a Directive principle of State policy is a public purpose.<sup>21,22</sup>

7. A public purpose is either a purpose of the Union or of a State or any other public purpose.<sup>23</sup> Cases where the State acquires or requisitions property for utilitarian institutions or welfare schemes, fall within the third category. An undertaking may possibly have all the three aspects and may serve the purpose of a State, the purpose of the Union and a general public purpose.<sup>24</sup>

8. The following are some purposes which have been held to be public purposes—

(i) The housing of a Minister,<sup>25</sup> public officer,<sup>26</sup> an employee of the State Transport Corporation;<sup>27</sup> a member of a foreign Consulate,<sup>28</sup> or the general public in a condition of acute shortage of accommodation, e.g., owing to the influx of refugees;<sup>29</sup> or the members of a non-profit making co-operative society.<sup>3</sup>

(ii) Rehabilitation of 'refugees'.<sup>3</sup>

(iii) Doing away with unemployment amongst a section of the community.<sup>4</sup>

(iv) A scheme of land reforms, even though it may ultimately benefit a class of tenants.<sup>5,6</sup>

(v) Land reform by nationalising the means of production and elimination of the concentration of the means of production in the hands of a few individuals;<sup>7</sup> elimination of intermediaries between the Government and the tillers of the soil and vesting the management of cultivation in a village body.<sup>8</sup>

(vi) Building a factory for manufacture of textiles in pursuance of the Five-Year Plan.<sup>9</sup>

9. On the other hand, it has been held that the following purposes are not 'public purpose':

The mere purpose of raising revenue.<sup>1</sup>

#### Illustration.

S. 4 (b) of the Bihar Land Reforms Act, 1950 was invalidated on this ground. It provided that all outstanding arrears of rent, which were due to the proprietors and tenure-holders at the date of acquisition of the estate, should also vest in the estate, though the liability of the zemindars for payment of arrears of revenue and cesses should remain. Held, it had no connection with land reform. Its only object was to raise revenue to pay compensation to the zemindars for acquisition of their estate. It was obviously a colourable legislation.<sup>2</sup>

21. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 : (1952-54) 2 C.C. 353 (361, 362, 379).

22. *Satyavalli v. State of Madras*, A. 1952 Mad. 252.

23. *State of Bombay v. Gulshan*, A. 1955 S.C. 810.

24. *Sudhindra v. Sailendra*, (1950) 87 C.L.J. 140 (142).

25. *Manohar v. Desai*, A. 1951 Nag. 33 (36); *Abdul Hamid v. State of W. B.*, (1952) 89 C.L.J. 268.

1. *Tef Ram v. Union of India*, A. 1959 Punj. 478.

2. *Safi v. State of West Bengal*, (1951) 55 C.W.N. 463; *Gurdial v. The State*, A. 1952 Punj. 55.

3. *Dwarkadas v. Sholapur Spinning Co.*, I.L.R. (1951) Bom. 473 (490).

4. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (311-2).

5. *Vishveswar v. State of M. P.*, (1952) S.C.R. 1020. Mahajan J.

6. *Aurora v. State of U. P.*, A. 1958 All. 872 (878).

7. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (273, 275, 279, 288, 295).

### Competence of the Legislature.

It should be pointed out in the present context that Entries 33 of List I and 36 of List II, which circumscribed the respective powers of the Union and the State Legislatures to Union and State purposes respectively, have been omitted by the **Constitution (Seventh Amendment) Act, 1956**. Under the amended Entry 42 of List III (see *post*), either the Union or a State Legislature can acquire or requisition property, for any public purpose subject, of course, to the territorial jurisdiction over the property, in the case of a State Legislature.

### How far the existence of 'public purpose' is justiciable.

1. Prior to the amendment of Cl. (2) by the **Constitution (Fourth Amendment) Act, 1955**, the language of the Clause was not quite clear, and the Court had to infer by *implication* that the existence of a 'public purpose' was a condition precedent to compulsory acquisition of private property, and that, accordingly, the question was justiciable. But the words 'save for a public purpose', inserted by the Amendment Act, makes public purpose an express condition of compulsory acquisition or requisition and no doubt is left that when it is found that there was no public purpose to support a law of compulsory acquisition, the Court is bound to declare the law unconstitutional.<sup>8</sup>

2. Any law to which Art. 31 (2) is attracted, would be unconstitutional if it seeks to make the Executive determination of the existence of a public purpose 'final' and non-justiciable.<sup>9</sup>

3. Of course when the Legislature declares that there is a public purpose, the Courts should respect its words,<sup>10</sup> and in examining whether there is a public purpose behind a scheme for acquisition, the scheme should be examined as a whole instead of picking out particular items to say that they are not supported by any public purpose.<sup>11</sup>

4. It is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intentment of the Act it could be gathered that the property was being acquired either for purposes of the State or for the purposes of the public and that the intention was to benefit the community at large.<sup>12,13</sup> It may be established from the proved facts.<sup>14,15</sup>

5. Once it is held that a public purpose exists, it is not competent for the Court to go into the further question, namely, whether that public purpose could be secured by a compulsory acquisition or requisition or otherwise. In other words, the *necessity* for the acquisition or requisition is not a justiciable question.<sup>16</sup> But otherwise, Government is the best judge of the need for the land;<sup>17</sup> whether that need is a public purpose or not remains justiciable.<sup>18</sup> Similarly, it is for the Government, not the court, to decide whether a particular work is to prove useful to the public.<sup>19</sup>

6. Since 'public purpose' is a condition precedent to the exercise of the power of compulsory acquisition by the State, it is clear that the State has no power to compulsorily acquire or requisition private property for private purposes, that is to say, to take the property of

8. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252, Aiyar J.

9. Cf. *Satya Narayan v. State of W. B.*, A. 1957 Cal. 310 (315).

10. *Ibid.*, p. 291, Das J.

11. *Ibid.*, p. 274, Mahajan J.

12. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777.

13. *Satya Narayan v. State of W. B.*, A. 1957 Cal. 310.

14. *Prov. of Bombay v. Khushaldas*, A. 1950 S.C. 222 (229).

15. *Aurora v. State of U. P.*, A. 1958 All. 872 (877-8).

16. *Sachindra v. State of W. B.*, A. 1958 Cal. 510.



A to serve the purposes of B,<sup>17</sup> where there is no scheme of public utility involved.

### Obligation to pay compensation for acquisition or requisitioning.

1. The obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property both under the doctrine of the English Common Law as well as under the Continental doctrine of *Eminent Domain* subsequently adopted in America. The Constitution of India has raised this obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right and declared that a law that does not make provision for payment of compensation shall be void.

### Illustration.

A law which leaves it entirely to the discretion of the Government to requisition the stocks (say, of foodgrains) at *any rate* fixed by it at its discretion, offends against Art. 31 (2) as it fails to specify the principles on which compensation is to be paid.<sup>18</sup>

2. But by subsequent amendments, the above fundamental right has been hemmed in by certain limitations:

*Firstly*, while 'compensation' literally means a 'full and fair equivalent of the property taken',<sup>19</sup> cl. (2), as amended by the **Constitution (Fourth Amendment) Act**, provides that inadequacy of the compensation provided for by the Legislature shall not be called into question in a Court of law. Hence, an individual shall have no legal remedy even though he is not paid the full monetary equivalent of the property taken from him.<sup>20</sup> He can obtain relief from the Courts, only if no compensation is provided for at all, either literally or *in effect*<sup>21</sup> (see *below*).

*Secondly*, the application of cl. (2) is altogether excluded in the cases coming under Arts. 31A-31B, so that in these cases, the Courts shall not be entitled to interfere even though no compensation at all has been provided (see *post*).

### Adequacy of compensation no longer justiciable.

1. It has already been pointed out that as a result of the amendment of cl. (2) by the **Constitution (Fourth Amendment) Act, 1955**, a law coming under Art. 31 (2) will no longer be open to attack in a Court of law on the ground that the compensation provided by the Legislature is not adequate, *e.g.*, being less than the market value of the property,<sup>22</sup> or being less than the equivalent of what the owner had been deprived of,<sup>23</sup> or that compensation has been provided at the same rate for different classes of property without having regard to the difference in their nature and quality.<sup>24</sup>

2. But Cl. (2) still requires that *some* compensation must be 'given'.<sup>25</sup>

17. *Cf. West Bengal Co-op. Soc. v. Bella*, A. 1952 Cal. 554.

18. *State of Rajasthan v. Nathmal*, A. 1954 S.C. 307.

19. *Asst. Collector v. Jamnadas*, A. 1960 Bom. 35 (40).

20. This view of the Author, expressed at p. 118 of the First Edition of this book has been adopted in *Namasivaya v. State of Madras*, A. 1950 Mad. 548 (554).

21. *Cf. Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (363).

22. *Cf. State of W. B. v. Bela Banerjee*, (1954) S.C.R. 588.

(a) It is not open to the Legislature to lay down principles which may result in non-payment of compensation or which may result in not paying any compensation whatsoever.<sup>23</sup> In such a case, the law will now be invalid for contravention of Art. 31 (2) itself.<sup>24</sup>

#### Illustration.

(i) It is on this principle that the Supreme Court annulled s. 23 (f) of the Bihar Land Reforms Act, 1950, which provided that the net income of the proprietor for the purpose of determining compensation, shall be computed by deducting from the gross asset of the proprietor, the cost of works for the benefit to the raiyats of such estates at the rates varying from 4 to 12½ per cent, according to the amount of the gross asset,—for, the calculation of the cost of such works at a flat rate without reference to the actual expenses, which reduces the net income which is the basis of the assessment of compensation, is of a confiscatory character, and partially negatives the provision for payment of compensation.<sup>25</sup>

(ii) Where the Legislature provides that no compensation shall be paid for improvements made after a specified date, except agricultural improvements, it amounts to a confiscation of the non-agricultural improvements, and such provision must be struck down, even after the insertion of cl. (2A).<sup>26</sup>

(b) It is not open to the Legislature to provide that no compensation is to be paid for a part of the property acquired.<sup>27</sup>

3. It must be some pecuniary benefit to the individual in lieu of the property taken from him and not some benefit which may be conferred upon him along with other members of the public.<sup>28</sup> Thus, where land is taken away from an individual without providing for any payment of compensation to him, it cannot be said that Art. 31 (2) has been complied with because the land so taken or some portion of it has been set apart for the use of the public.<sup>29</sup>

4. There is a contravention of Art. 31 (2) if the Legislature neither fixes the amount of compensation itself nor specifies the principles for its determination.<sup>1</sup> The task of determining the principles must be performed by the Legislature itself. But there is no unconstitutional delegation of legislative power where the Legislature has laid down the principle according to which compensation is to be paid but leaves it to the Executive to apply those principles according to particular circumstances.<sup>2</sup>

Thus, the Legislature may provide for payment of compensation in instalments but leave it to the Executive to specify the instalments.<sup>3</sup>

**Whether the Legislature can provide for payment of compensation on the basis of the value at a time anterior to that of acquisition.**

According to the general principles relating to compensation, it is settled<sup>4</sup> that the compensation must be the monetary equivalent of the property on the date of the acquisition.

23. *Cf. State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (270, 275-6) : (1952) S.C.R. 889.

24. *Mukhtar Singh v. State of U. P.*, A. 1957 All. 397 (303, 305).

25. *Namaswamy v. State of Madras*, (1959) 2 M.L.J. 403 (412).

1. *State of Rajasthan v. Nathmal*, (1952-54) 2 C.C. 239 (241) : A. 1954 S.C. 307.

2. *Visheshwar v. State of M. P.*, (1952-54) 2 C.C. 387 (392) : (1952) S.C.R. 1020.

3. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 (564).



In *State of W. B. v. Bela Banerjee*,<sup>4</sup> the State Legislature fixed an arbitrary date anterior to the date of acquisition for the purpose of assessing the value for the purposes of compensation in respect of acquisition at any future time and the Supreme Court annulled the provision with the following observation—

"Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on December 31, 1946, as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Art. 31 (2). The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary."

It would appear from the above observation that the Supreme Court would tolerate a similar provision if (a) the measure was a temporary one and (b) was enacted with a view to meet an abnormal situation, e.g., where there is a speculative rise in the value of land after the scheme of acquisition becomes known to the public; but that if the measure be a permanent one, the prescription of a fixed date irrespective of the time of acquisition would be arbitrary.

The object of amendment of cl. (2) of Art. 31 by the Constitution (Fourth Amendment) Act, 1955 was to counteract the decision in the above case.<sup>5</sup> The question is how far the amendment would preclude the Court from questioning the quantum of compensation even if the statute were permanent and the date fixed has no rational connection with the value of the land at the time of acquisition.

After the Amendment, the question came up before the Madras High Court<sup>6</sup> in respect of a permanent enactment, viz., the Madras Lignite (Acquisition of Land) Act, 1953. No doubt, the intention of the Government to acquire the lands was announced by a Press Note dated the 6th October, 1948 and the prices, in fact, went up since then. But the Act specified even a date anterior to that, namely, the 28th April, 1947, for assessment of the value for purposes of compensation, *without indicating the reasons why* such an arbitrary date was being fixed. The provision was, obviously, outside the exceptional case admitted by the Supreme Court in *Bela Banerjee's case*, and the Madras High Court annulled the provision.<sup>7</sup>

The Madras High Court<sup>8</sup> avoided the bar imposed by the amendment by holding that the question raised in this case was not one of 'adequacy' of the compensation but raised a more fundamental question, namely, whether the Legislature had, in fact, fixed the 'principles on which the compensation is to be determined and given', as enjoined by the earlier part of cl. (2),—which was not affected by the amendment.

If the fixing of an earlier date involves the 'principle' of payment of compensation, apart from its quantum or adequacy, the decision of the Madras High Court remains unassailable.

#### CL. (3): Validity of State Laws.

1. This clause means that no law relating to acquisition or requisition made by the State Legislature after the commencement of the Constitution shall be valid unless it is reserved for consideration of the

4. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 (564).

5. *Namaswami v. State of Madras*, (1959) 2 M.L.J. 402 (412).

President (Art. 200) and receives his assent (Art. 201). Where this condition has not been complied with, any proceedings taken under the Act shall be void.<sup>6</sup>

2. The word 'law' in the clause and in cl. (6) appears to have been loosely used to mean a bill. Again, the President is not obliged to give his assent twice over, once under Art. 31 (3) and again under Art. 200. When a Bill is referred to under Art. 200, the President is not debarred from seeing whether it fulfils the requirements of Art. 31 (3).<sup>7</sup>

3. The Supreme Court has held<sup>8</sup> that cl. (3) is attracted only where the State Legislature enacts a *substantive* legislation relating to acquisition or requisition, after the commencement of the Constitution. An Act which amends an existing law which is covered by cl. (5) (a) is also covered by that clause and need not comply with the requirement of cl. (3).<sup>9</sup>

4. The assent of the President is required to enable the State Legislature to enact the law, but it does not preclude any challenge as to the invalidity of the law owing to contravention of any other provision of the Constitution, e.g., Art. 31 (2).<sup>10</sup> In this respect, cl. (3) differs from cl. (4).<sup>11</sup>

#### Cl. (4): Pending Bills.

1. Cl. (4) relates to Bills of a State Legislature relating to public acquisition which were *pending* at the commencement of the Constitution. If such a Bill has been passed and assented to by the President, the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of Cl. (2), i.e., on the ground that it does not provide for compensation<sup>12</sup> or that it has been enacted without a public purpose.<sup>13</sup>

2. But Cl. (4) would not debar the Courts from examining the validity of the law on other grounds, e.g., whether the law contravenes the guarantee of equal protection in Art. 14, e.g., by providing different principles of compensation for different sets of persons without any reasonable basis for such classification.<sup>14</sup>

3. What the present clause requires is that the Bill must be pending on the date of commencement of the Constitution and not that the Act ultimately passed must in every respect follow the Bill.<sup>15</sup> In other words, it does not require that the Bill must be passed without any amendment.<sup>16</sup>

6. *Rameshwar v. Misra*, A. 1959 Pat. 488.

7. *Cf. State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (262, 300); (1952) S.C.R. 889.

8. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (526).

9. It is submitted that the above interpretation unduly widens the meaning of 'existing law' in Art. 31 (5) (a), which must be controlled by the definition in Art. 366 (10) and cannot accordingly, include any law passed after the commencement of the Constitution, whether amending or otherwise. [See *Okara E.S.C. v. State of Punjab*, at p. 179].

10. *Namasivaya v. State of Madras*, A. 1959 Mad. 548 (553).

11. *Cf. Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182).

12. *Jagaveera v. State of Madras*, (1954) S.C.R. 761.

13. *Kameshwar v. State of Bihar*, A. 1951 Pat. 91 (101, 106); affirmed by *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (273), Mahajan, Mukherjea and Aiyar JJ.

14. *Ram Dubey v. Govt. of M. B.*, A. 1952 W.B. 57 (67).

15. *Gajapati v. State of Orissa*, A. 1953 S.C. 375.



**Scope of cl. (5).**

1. This clause provides a number of exceptions to the requirements of cl. (2). So, as regards laws coming under this clause [as under cl. (4)], too, the Courts shall have no power to examine the validity of the legislation either on the ground of absence of provision for compensation<sup>16</sup> or on the ground of non-existence of public purpose.<sup>17</sup>

2. But cl. (5) only excludes the application of cl. (2). Hence, the validity of a law coming under cl. (5) can be challenged for the violation of any other fundamental right, e.g., under Art. 14,<sup>18</sup> or want of legislative competence at the time when it was made,<sup>19</sup> e.g., for contravention of s. 299 (2) of the Government of India Act, 1935.<sup>20</sup>

3. Cl. (5) applies to two classes of laws—

(a) 'Existing laws' other than those which come under cl. (6), i.e., laws enacted more than 18 months before commencement of the Constitution.<sup>21,22</sup>

(b) Any law made by a State Legislature or by the Union Parliament (i.e., any law made after commencement of the Constitution), for any of the purposes mentioned in items (i)-(iii) of sub-cl. (b).

**Sub-cl. (a).**

1. The following laws would come within the scope of cl. (5) (a) :

(a) Provincial Acts such as the West Bengal Premises Requisition and Control Act (V of 1947);<sup>23</sup> Travancore-Cochin Salt Act, 1938 M.R.;<sup>24</sup> Bombay Land Requisition Act, 1948.<sup>25</sup>

(b) Central Acts such as the Land Acquisition Act, 1894;<sup>1</sup> Cantonments Act, 1924;<sup>2</sup> Electricity Act, 1910.<sup>3</sup>

2. Where an 'existing law' is amended by an Amending Act subsequent to the commencement of the Constitution or within 18 months prior to the commencement of the Constitution and the Amending Act contravenes the provisions of cl. (2) of Art. 31, it is only the amending provisions which will fail, if they are severable.<sup>26</sup> But if the life of a pre-Constitution Act is extended by an amending Act, after the commencement of the Constitution, the Act ceases to have the protection of Art. 31 (5).<sup>4</sup>

16. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 : (1952-4) 2 C.C. 353.

17. It is to be noted that under the amended cl. (2), the existence of 'public purpose' is an express condition; hence, if the application of cl. (2) is excepted, the question of existence of public purpose to test the validity of laws coming under cl. (5) is also placed beyond question in the Courts. [Cf. *Mohan v. Custodian*, A. 1956 Pepsu 58 (64); *Aurora Ram v. State of U. P.*, A. 1958 All. 126 (131)].

18. *Khandewal v. State of U. P.*, A. 1955 All. 12 (18).

19. *Kanpur Oil Mills v. Judge, Sales Tax*, A. 1955 All. 99.

20. *Asstt. Collector v. Jamnadas*, A. 1960 Bom. 35 (42).

21. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

22. *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

23. *Sudhindra v. Sallendra*, A. 1952 Cal. 65 (67); *Srinivas v. State of W. Bengal*, A. 1954 Cal. 171.

24. *Mansoor v. T. C. Government*, A. 1952 T.C. 14.

25. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (526).

1. *Aurora Ram v. State of U. P.*, A. 1958 All. 872 (876).

2. *Ram Narayan v. Dinapore Cantt. Board*, A. 1958 Pat. 71 (74).

3. *Srinivas v. State of W. B.*, A. 1954 Cal. 171.

4. *Satya Narayana v. State of W. B.*, A. 1957 Cal. 310 (314).

3. But notifications issued after the commencement of the Constitution cannot be challenged as unconstitutional if the Act under which they are issued are protected by Art. 31 (5) (a).<sup>5</sup>

#### Sub-cl. (b).

Any law passed by the State *subsequent* to the commencement of the Constitution, for any of the following purposes come within cl. (5) (b)—(i) taxation or penalty, *i.e.*, fiscal and penal statutes; (ii) promotion of public health, prevention of danger to life or property; (iii) enforcement of any agreement relating to evacuee property, with another Government.<sup>6</sup> Any enactment for the prevention of encroachment upon public lands cannot be said to come under this cl. (5) (b) (ii).<sup>7</sup> The Administration of Evacuee Property Act, 1950, comes under clause (5) (b) (iii).<sup>8</sup> The word "otherwise" implies that the law need not always be based on an agreement with a foreign country.<sup>9</sup>

#### Cl. (6): Validity of certain pre-Constitution laws.

1. This clause lays down that a pre-Constitution State law shall not be questioned in any Court on ground of contravention of cl. (2) of Art. 31 or of s. 299 (2) of the Government of India Act, 1935, if it satisfies two conditions—(i) that it was enacted within 18 months before 26-1-50 and (ii) that it was submitted for the President's certification by 26-4-50 and was certified by him.

2. But if a provincial law was passed within 18 months before 26-1-50 and yet the certificate of the President was not obtained, it would not be entitled to the protection of the present clause against the operation of s. 299 (2) of the Government of India Act, 1935 or of Art. 31 (2) of the Constitution, *e.g.*, (a) West Bengal Land Development and Planning Act, 1948;<sup>10</sup> (b) Madras Aliyasanthana Act, 1949;<sup>11</sup> (c) Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons (Land Acquisition) Act, 1948.<sup>12</sup>

3. The ambit of the protection given by cl. (b) is co-extensive with that given by cl. (4) [see p. 178, *ante*].

4. Certification would not, however, cure defects outside s. 299 (2) of the Government of India Act, 1935 or Art. 31 (2) of the Constitution, *e.g.*, absence of legislative competence.<sup>13</sup>

Saving of laws providing for acquisition of estates, etc. <sup>13</sup>**31A.** (1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

5. *Mansoor v. Govt. of U.S.T.C.*, A. 1952 T.C. 14.

6. *Mohan v. Custodian*, A. 1956 Pepsu 58.

7. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (14).

8. *Sampuran v. Competent Officer*, A. 1955 Pepsu 148.

9. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 : A. 1954 S.C. 170.

10. *Santhamma v. Neelamma*, A. 1957 Mad. 642 (652).

11. *Satrughna v. State of Orissa*, A. 1958 Orissa 187 (192).

12. *Rajahmundry E. S. Co. v. State of Andhra*, A. 1954 S.C. 251.

13. This Article was first inserted by the Constitution (First Amendment) Act, 1951 and the italicised words were substituted by the Constitution (Fourth Amendment) Act, 1955.



- (b) *the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or*
- (c) *the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or*
- (d) *the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or*
- (e) *the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, -*

*shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 :*

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,—

- (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir, inam or muafi* or other similar grant and in the States of Madras and Kerala any *janmam right*;<sup>14</sup>
- (b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyat, under-raiyat* or other intermediary and any rights or privileges in respect of land revenue.<sup>15</sup>

14. Substituted for "Travancore-Cochin" by the Constitution (Seventh Amendment) Act, 1956.

15. In its application to the State of Jammu and Kashmir, the proviso to clause (1) of article 31A shall be omitted, and for sub-clause (a) of clause (2) thereof, the following sub-clause shall be substituted, namely :—

(a) "estate" shall mean land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes—

(i) sites of buildings and other structures on such land;

**Amendment.**—The Article was originally inserted by s. 4 of the Constitution (First Amendment) Act, 1951, and later amended by the Constitution (Fourth Amendment) Act, 1955, as shown by italics.

**Object of Art. 31A.**—Shortly speaking, the object of the introduction of Art. 31A by the Constitution (First Amendment) Act, 1951 was to validate the acquisition of zemindaries or the abolition of the Permanent Settlement without interference from the Courts:

Art. 31A provided that no law (past or future) affecting rights of any proprietor or intermediate holder in any *estate* shall be void on the ground that it is inconsistent with any of the fundamental rights included in Part III of the Constitution. That is to say, no such law shall be liable to attack on the ground that no compensation has been provided for, or that there is no public purpose<sup>16,17</sup> or that it violates some other provision of Part III, e.g., Art. 14.<sup>18</sup>

**Object of further amendment by the Constitution (Fourth Amendment) Act, 1955.**—The object of this amendment is to take out not only laws relating to abolition of Zemindari but also other items of agrarian and social welfare legislation, which affect proprietary rights, altogether, from the purview of Arts. 14, 19 and 31. The object is thus explained in the Statement of Objects and Reasons—

"It will be recalled that the zemindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines, e.g., the following:—

(i) While the abolition of zemindaries and the numerous intermediaries between the State and the tiller of the soil has been achieved for the most part, our next objectives in land reform are the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings.

(ii) In the interests of national economy the State should have full control over the mineral and oil resources of the country, including in particular, the power to cancel or modify the terms and conditions of prospecting licences, mining leases and similar agreements,

- 
- (ii) trees standing on such land;
  - (iii) forest land and wooded waste;
  - (iv) area covered by or fields floating over water;
  - (v) sites of *Jandars* and *gharats*;
  - (vi) any *jagir*, *inam*, *muafi* or *mukarrari* or other similar grant, but does not include—

- (i) the site of any building in any town, or town area or village *abadi* or any land appurtenant to any such building or site;
- (ii) any land which is occupied as the site of a town or village; or
- (iii) any land reserved for building purposes in a municipality or notified area or cantonment or town area or any area for which a town planning scheme is sanctioned.<sup>1</sup>

16. *State of Bihar v. Kameshwar, A.* (1952) S.C. 252 (263): (1952) S.C.R. 889.

17. *Visheswar v. State of M. P.* (1952) S.C.R. 1020.



(iii) It is often necessary to take over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution.

(iv) The reforms in company law now under contemplation, such as the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another, etc., require to be placed above challenge.

It is accordingly proposed in clause 3 of the Bill to extend the scope of article 31A so as to cover these categories of essential welfare legislation.<sup>17</sup>

**Arts. 31A and 31 (4).**—The scope of Art. 31 (4) is at once narrower and wider than that of Art. 31A—

(i) Art. 31 (4) has application only to statutes which were *pending* in the Legislature at the commencement of the Constitution, whereas Art. 31A is subject to no such restriction.

(ii) Art. 31 (4) excludes attack only on the ground of contravention of Art. 31 (2), while Art. 31A bars objections based on contravention of Arts. 14 and 19 as well.<sup>18</sup>

(iii) On the other hand, Art. 31 (4) covers acquisition of *any kind of property*, while Art. 31A (1) (a) relates only to the acquisition of a particular kind of property, *viz.*, estates and rights therein.

(iv) Though confined to estates or rights therein, Art. 31A (1) (a) covers not only laws for their acquisition but also for their extinguishment or modification.<sup>19</sup>

### 'Notwithstanding anything in Art. 13'.

1. The words in Art. 31A (1) prior to the Amendment by the **Constitution (Fourth Amendment) Act, 1955** were 'notwithstanding anything in the foregoing provisions of this Part'. The change is rather verbal, for either expression excludes the application of any of the fundamental rights conferred by the three Articles which are specified, *viz.*, Arts. 14,<sup>19</sup> 19,<sup>20</sup> 31<sup>21</sup> (including the question of public purpose).<sup>19, 22</sup>

2. But a challenge on the ground of contravention of other Articles is not precluded, *e.g.*, that certain provisions of a law authorising State management of the property of a Mutt infringed the provisions of Arts. 25-26.<sup>23</sup>

In this respect, the Constitution (Fourth Amendment) Act, 1955 is more liberal than the First Amendment Act, 1954, for while the original Art. 31A precluded a challenge on the ground of violation of 'any of the rights conferred by any provisions of this Part,' *i.e.*, any of the fundamental rights, the amendment of 1954 has restricted it to the contravention of three specified Arts. only *viz.*, Arts. 14, 19, 31.

3. Prior to the amendment of Art. 31 (2) by the Constitution (Fourth Amendment) Act, 1955, it was held by the majority of the Supreme Court in *State of Bihar v. Kameshwar*,<sup>24</sup> that the existence of a public purpose was an inherent condition for compulsory acquisition of

18. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

19. *Cf. Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (364, 366).

20. *Cf. State of Bihar v. Kameswar*, (1952) S.C.R. 889; *Suryapal v. State of U. P.*, (1952) S.C.R. 1036.

21. *Cf. Umeg Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182).

22. *Gangadharrao v. State of Bombay*, A. 1955 Bom. 28.

23. *Commr. H. R. E. v. Lakshminidra*, (1954) S.C.R. 1005.

private property by the State. Following the above view, the Saurashtra High Court held<sup>24</sup> that Art. 31A did not debar the Court from questioning the existence of a public purpose behind a law coming under this Article. Such a contention would now be precluded since the amendment has laid down the existence of a public purpose as an express condition or requisition under Art. 31.

4. Further, Entry 42 of List III having been amended at the same time, so as to omit any reference to compensation therefrom, it can no longer be contended that a provision for compensation is a condition for the exercise of the legislative power conferred by that Entry. The obligation to provide for compensation is now exclusively contained in Art. 31 (2), and since an application of that Article is excluded by Art. 31A, a law which comes under Art. 31A can no longer be challenged as a **colourable legislation** or as **confiscatory** in nature.<sup>25</sup>

**Sub-cl. (1): 'Law providing for the acquisition by the State of an estate'.**

1. For the application of this Article, it is not necessary that the Act must expressly state that the Estate or the rights therein *vest* in the State. It is sufficient if the provisions of the Act by themselves show that the acquisition is by the State.<sup>26</sup> Nor is it essential that the acquisition must be immediate. There is nothing wrong in its happening gradually or on the initiative of the intermediary person, such as a tenant, if the actual extinguishment of the rights in the estate takes place on payment of compensation by the State.

2. Where there is a law providing for the acquisition of an estate, any Act amending the same, enacted after the coming into operation of Art. 31A shall be entitled to the protection of that Article.<sup>1</sup>

3. The protection of Art. 31A (1) is not lost merely because an Act is given retrospective effect and vests an estate in the Government from a date anterior to the coming into force of the Act.<sup>2</sup>

4. Resumption of a jagir for breach of a condition of the grant is not acquisition but if the State wants to take the property of the jagirdar for a public purpose, it is an acquisition within the meaning of Art. 31A.<sup>3</sup>

5. Acquisition of 'arrear of rent' due to a landlord is not acquisition of an estate or of any rights therein within the meaning of Art. 31A but is an acquisition of money or of choses in action which falls outside the scope of Art. 31A (1) (a).<sup>4</sup>

#### **Ancillary measures may be included.**

A law for the acquisition of an estate etc. does not lose the protection of Art. 31A (1) merely because ancillary provisions<sup>5</sup> are included in such law, e.g.—

(i) A provision for acquisition of buildings as appurtenant to the estates within which they lie.<sup>6,7</sup>

(ii) A provision for the investigation into and annulment of transfers fraudulently made immediately preceding the enactment of an

24. *Kalika Kumar v. Saurashtra State*, A. 1952 Saa. 114.

25. *Cf. Umegh Singh v. State of Bombay* (1955) 2 S.C.R. 164 (182).

1. *Sankarsana v. Orissa State*, A. 1957 Orissa 96 (99).

2. *Raghubir v. State of Ajmer*, A. 1959 S.C. 476 (477).

3. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303.

4. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

5. *Raghubir v. State of Ajmer*, A. 1959 S.C. 476 (477).

6. *Gajapati v. State of Orissa*, (1954) S.C.R. 1: (1952-54) 2 C.C. 500 (507).

7. *Kamakshya Narain v. Collector*, (1956) S.C.A. 494 (499).



Act for abolition of zemindari, with the object of defeating the provisions of the Act.

(iii) A provision for encouragement of self-cultivation of the land, after abolition of the intermediaries.<sup>3</sup>

'Estate'.--See under Cl. (2) (a), below.

'Rights therein'.

1. Cl. (1) (a) applies only if it is a right in an estate. The definition of 'estate' in cl. (2) (a) shows that by that word the Constitution was contemplating the different forms of land tenure under which property is held in India. It cannot, therefore, include a personal right such as the right of pre-emption, arising out of a sale.<sup>4</sup>

2. On the other hand, the expression is wide enough to include the interests of a mortgagee<sup>5</sup> of a tenure.

'Extinguishment of such rights'.

1. This expression means the extinguishment of the rights in an estate without involving the process of its 'acquisition' by the State.<sup>6</sup>

2. A measure of agrarian reform which fixes the ceiling area for the holding of the landlord for his personal cultivation and transfers the excess to his tenants, would be protected by this clause.<sup>11</sup>

'Modification of any such rights'.

1. The word 'modification', in the context of Art. 31A only means a substantive modification of the proprietary right of a citizen and has to be understood in juxtaposition with the word 'extinguishment'. It does not include a mere restriction imposed<sup>12</sup> upon the right, or even a suspension<sup>13</sup> thereof, e.g., the suspension of the right of management of a landlord who is disqualified to manage his own property.<sup>14</sup>

2. The following have been held to constitute a 'modification' within the meaning of this provision :

(i) A law which limits the maximum holding of a landlord.<sup>14</sup>

(ii) A law which limits the landlord's right to recover possession of the land held by a tenant, for his personal cultivation.<sup>14</sup>

(iii) A transfer of the landlord's title to the tenant, subject to a condition of defeasance.<sup>14</sup>

3. On the other hand, the following have been held *not* to constitute an 'extinguishment or modification' of the rights in an estate, so as to attract the protection of Art. 31A (1) (a) :

(a) The suspension of the right of management<sup>15</sup> of the landlord by taking the estate over under the Court of Wards, on the ground of mismanagement.<sup>14</sup>

(b) A procedural requirement imposed upon the right of the landlord to terminate the tenancy of his tenant.<sup>11</sup>

8. *Balabhai v. Bapuji*, (1958) 60 Bom. L.R. 12 (24) : A. 1957 Bom. 233 (F.B.).

9. *Surpat v. State of W. B.*, (1950) 63 C.W.N. 571 (756).

10. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

11. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459.

12. *Abdul Rahiman v. Vilhal*, A. 1958 Bom. 94 (99).

13. *Raghuvir v. Court of Wards*, (1953) S.C.R. 1049 : A. 1953 S.C.

373.

14. *Bhagirath v. State of Punjab*, A. 1954 Punj. 167.

15. *Parashram v. State of Bombay*, A. 1957 Bom. 252.

16. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (472).

17. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (472).

18. *Raghuvir v. Court of Wards*, (1953) S.C.R. 1049 : A. 1953 S.C.

373.

19. *Abdul Rahman v. Vilhal*, A. 1958 Bom. 94 (99).

**Sub-cl. (b): 'Taking over of management of any property'.**

1. This sub-clause is intended<sup>20</sup> to counteract the effects of the two *Sholapur cases*.<sup>21,22</sup>

2. It is to be noted that sub-clause (b) is not restricted to industrial undertakings only, but extends to any kind of property. Hence, the State can now take over the management of any property, movable or immovable, for a limited period, without being obliged to justify its action in a court of law, with reference to Art. 14, 19 or 31.

3. Prior to the introduction of this clause it was held that the word 'modification' in cl. (a) meant the extinction of the proprietary right and that, accordingly, a mere suspension of the right of management of an estate for a definite time would not come under Art. 31A.<sup>23</sup> The present clause covers such a case.

4. The conditions for the application of sub-cl. (b) are—

(a) The taking over must be for a *limited* and not an indefinite<sup>24</sup> period of time.

(b) It must be either in the public interest or in order to secure the proper management of the property. As instances of 'public interest' may be mentioned—prevention of infringement of the rights of tenants;<sup>25</sup> full and efficient use of the land for agriculture;<sup>26</sup> safeguarding of the interests of the holders of life insurance policies.<sup>1,2</sup>

5. As instances of taking over for proper management may be mentioned the management of the property of a 'ward' or disqualified proprietor.<sup>3</sup>

**Sub-cl. (c): Amalgamation of corporations.**

The object of this clause is to facilitate the elimination of unhealthy competition between rival concerns operating in the same field where the interests of the public call for such action, by precluding the objection that the amalgamation of existing companies constitutes an unreasonable restriction with the rights of shareholders guaranteed by Art. 19 (1) (f).<sup>4</sup>

**Sub-cl. (d): Extinction or modification of rights of directors or share-holders etc.**

In *Chiranjit Lal's case*,<sup>21</sup> a question was raised whether the voting right of a shareholder in a company was a right of 'property' or a mere personal privilege flowing from his proprietary right. The amendment seeks to avoid any such question and provides that no question of infringement of Art. 19 (1) (f) or 31 will arise if the voting rights of share-holders are affected by any law. The rights of managing agents, secretaries and treasurers, managing directors, directors or managers are also similarly treated. In a sense, cl. (d) reinforces cl. (b); but it is of wider scope. Even where the State does not take

20. See C. 3, Vol. 1, pp. 842-3.

21. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 : (1950) S.C.R. 869 : A. 1951 S.C. 41.

22. *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C. 674 (583).

23. *Raghubir v. Court of Wards*, (1953 S.C.R. 1049 : A. 1953 S.C. 373).

24. As happened in *State of Rajasthan v. Manohar*, (1954) S.C.R. 996, or *Raghubir v. Court of Wards*, (1953) S.C.R. 1049.

25. *Jayantilal v. State of Saurashtra*, A. 1952 Sau. 59.

1. *Jupiter General Ins. Co. v. Rajagopalan*, A. 1952 Punj. 9.

2. *Tropical Ins. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519).

3. *Kuldip v. State of Punjab*, A. 1954 Punj. 247.

4. *Cf. Narayanprasad v. Indian Iron & Steel Co.*, A. 1953 Cal. 695.



over the management but makes some other law which extinguishes or modifies the rights of the persons referred to, such law will not be open to challenge on the grounds specified.

**Sub-cl. (e): Extinction or modification of rights under mining leases.**

1. In some cases, the reasonableness of the Mining Concession Rules, made under the Mines & Minerals (Regulation & Development) Act, 1948, which vested some amount of discretion in the Executive in the matter of granting and cancellation of licenses, was challenged.\* The insertion of the present sub-clause precludes such attack on ground of contravention of Art. 19.

2. It also precludes any contention that compensation is payable under Art. 31 (2) on account of cancellation of an existing licence. The scope of the amendment is even wider and includes not only licenses but also agreements and leases. The Constitution Amendment Act thus empowers the State to affect even *contractual rights* relating to mineral development, without having to comply with Arts. 14, 19 or 31.

**Proviso.**

1. The word 'law' in this Proviso means no more than a *Bill*.<sup>4</sup>

2. The Proviso keeps alive the alternative provisions in Art. 31 (3) for judging whether the State law has or has not complied with the requirements of Art. 31 (2). The provisions of Art. 31 (2), therefore, do not stand repealed by Art. 31A. The difference is that persons whose properties fall within the definition of the expression 'estate' in Art. 31A, are deprived of their remedy under Art. 32 and the President has been constituted the sole judge of deciding whether a State law acquiring 'estates' has or has not complied with the requirements of Art. 31 (2).<sup>5</sup>

9. The Proviso, however, does not require that a bill must receive the assent of the President once under Art. 31 (3) and again under the Proviso to Art. 31A (1).<sup>7</sup>

**CL (2) (a): 'Estate'.**

1. Read with the expression 'other intermediary' in cl. (2) (b), the word 'estate' refers to the interest of an intermediary, i.e., a person standing between the State and the actual tiller of the soil. It cannot include a tenant who is actually cultivating the land,<sup>8</sup> unless the existing law of land tenure in an area includes such interests also in the definition of 'estate'.<sup>9</sup>

It is now settled<sup>10</sup> that the word 'estate' includes part of an estate. Hence, a law which modifies the rights of the landowner in certain portions of an estate (say, in some of the villages included in the estate), cannot be challenged on the ground that it is not covered by Art. 31A merely because it does not extend to the estate as a whole.<sup>11</sup>

4. *Cf. Mineral Development Ltd. v. Union of India*, A. 1954 Pat. 341.

5. *Ram Dubey v. Govt. of M. B.*, A. 1952 M.B. 57 (66).

6. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (310) : (1952) S.C.R. 889.

7. *Sankarsana v. Orissa State*, A. 1957 Orissa 96 (98-9).

8. *Ajab Singh v. State of U. P.*, A. 1957 All. 153 (154).

9. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (468).

10. *Atma Ram v. State of Punjab*, A. 1959 S.C. 519 (527).

11. *Bhagirath v. State of Punjab*, A. 1954 Punj. 167 (171) F.B.

3. The following interests in land have been held to be 'estates' within the meaning of Art. 31A :

- (a) The holdings of Mulgirassia, Bhyat and Talukdar in Saurashtra.<sup>12</sup>
- (b) Tikanas of Jaipur.<sup>13</sup>
- (c) Pre-settlement minor inams in the district of Ganjam.<sup>14</sup>
- (d) Bhomicharas of Rajasthan,<sup>15</sup> or Bhomias of Marwar.<sup>16</sup>
- (e) Vanta tenure in Bombay and Gujrat.<sup>17</sup>
- (f) Bhagdars, Narwadars and Khotes, landholders as well as occupants of unalienated lands, in Bombay.<sup>18</sup>
- (g) Jagirdars in Rajasthan.<sup>19</sup>

'Same meaning as . . . . in the existing law relating to land tenures'.

Under the Bombay Land Revenue Code, 1879, any interest in land<sup>20</sup>, including that of occupants of unalienated lands is an 'estate'. As regards the area governed by the Code, therefore, the word 'estate' in Art. 31A should receive the same interpretation.<sup>21</sup>

'Jagir or other similar grant'.

1. The object of Art. 31A being to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil, the words in the Article should be construed in that sense which would achieve that object in a full measure.<sup>22</sup>

2. Thus, the word 'jagir' should not be given the restricted meaning of a grant made for military service but should be construed in the popular sense so as to include all grants in respect of persons who were not cultivators which conferred on the grantees rights in respect of land revenue. Thus, maintenance grants in favour of members of the ruling family would be covered by this word.<sup>23</sup>

3. The grant need not be express.<sup>24</sup>

4. An *istimrar* would come within the expression 'other similar grant'.<sup>25</sup>

Cl. (2) (b) : 'Rights'.—See p. 185, *ante*.

'Other intermediary'.

These words at the end of cl. (2) (b) suggest that *all* the interests specified in the sub-clause are those of intermediaries, as distinguished from those of the actual cultivators.<sup>26</sup>

The Calcutta<sup>27</sup> and Punjab<sup>28</sup> High Courts have, however, held that the sub-clause include any right in an estate, whether it is the right of a mere rent-receiver or of a person in actual possession of the land.

It is submitted that the view taken by the Allahabad High Court.<sup>29</sup> seems to be preferable if cl. (2) (b) is read with cl. (1) (a).

12. *Kalika v. Saurashtra State*, A. 1952 San. 114.

13. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (352) : A. 1955 S.C. 504.

14. *Sankarsana v. State of Orissa*, A. 1957 Orissa 96.

15. *Gangadharrao v. State of Bombay*, A. 1959 Bom. 28.

16. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (468).

17. *Raghbir v. State of Ajmer*, A. 1959 S.C. 475 (480).

18. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (333) : A. 1955 S.C.R. 504.

19. *Ajab Singh v. State of U. P.*, A. 1957 All. 152 (154).

20. *Surendranath v. State of W. B.*, A. 1958 Cal. 96.

21. *State of Punjab v. Keshar*, A. 1959 Punj. 8 (17) F.B.

22. *Ananda v. State of Orissa*, A. 1956 S.C. 17.



**Effects of vesting of an estate in the State after acquisition.**

1. When an estate vests in the State as a result of compulsory acquisition under the power of 'eminent domain', the entire interest of the intermediaries in such estate vests in the State, free of all incumbrances. The State can accordingly, ignore pre-acquisition contracts with the intermediaries which created a mere *personal* right in favour of a third party, e.g., a right to enter and catch fish,<sup>23</sup> or a licence to do certain things upon the land.<sup>24</sup>

2. If, in any case, any pre-acquisition contract be binding upon the State, the remedy of the person aggrieved is to bring a suit for enforcement of the contract and not a petition under Art. 32, for, no fundamental right is infringed by refusing to comply with a contractual obligation.<sup>25</sup>

**31B.** *Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.*

Validation of certain Acts and Regulations.

*Validation of certain Acts and Regulations.*

**Amendment.**—Art. 31B was added to the Constitution by s. 5 of the Constitution (First Amendment) Act, 1951.

**Effects of Amendment.**

The amendment is retrospective, and validates the Acts included in the 9th Schedule, *ab initio*,<sup>26</sup> even though when enacted, the Act contravened the provisions of s. 299 of the Government of India Act, 1935.<sup>27</sup>

**Object of Art. 31B.**

1. Art. 31B has been inserted, by way of abundant caution, to save the particular Acts included in the 9th Schedule of the Constitution, notwithstanding any decision of a Court or tribunal that any of these Acts is void for contravention of any fundamental right. Nothing in Art. 31B shall be read as restricting the scope of Art. 31A.<sup>28</sup>

2. On the other hand, Art. 31B is not illustrative of the rule contained in Art. 31A, but stands independent of it, and validates certain Acts specified in the Ninth Schedule (see at the end of the book). One of these Acts is the Madhya Pradesh Abolition of Proprietary Rights Act (I of 1951), the validity of which has, accordingly, been upheld by the Supreme Court, though it was argued that the compensation provided was not real or adequate.<sup>29</sup>

23. *Shantabai v. State of Bombay*, A. 1958 S.C. 532 : (1959) S.C.R. 265, explaining away the contrary view in *Chhotabhai v. State of M. P.*, (1953) S.C.R. 476.

24. *Barrow v. State of U. P.*, A. 1958 All. 154 (158).

25. *Dhirubhai v. State of Bombay*, (1955) 1 S.C.R. 691.

1. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

2. *Visheswar v. State of M. P.*, (1952) S.C.R. 1020.

3. While Art. 31A is confined to estates, Art. 31B includes Acts which relate to properties which are not estates.<sup>1</sup>

#### Scope of Art. 31B.

1. Not only the Acts themselves but notifications subsequently issued in exercise of powers conferred by the Acts are also entitled to the protection of Art. 31B.<sup>2</sup>

2. Acts included in the Ninth Schedule should be interpreted by giving their words their ordinary meaning, uninfluenced by any pre-conceived notion.<sup>3</sup>

#### Power to amend the Acts specified in the Ninth Schedule.

The protection given by Art. 31B only applies to the acts as they stood at the date when the Constitution (First Amendment) Act, 1951, which inserted Art. 31B, was enacted. If the Legislature subsequently seeks to amend any of these Acts, such amendment must be consistent with the Fundamental Rights conferred by Part III of the Constitution.<sup>4</sup>

#### Illustrations.

1. At the time of its inclusion in the Ninth Schedule, s. 34 (1) of the Bombay Tenancy and Agricultural Lands Act, 1948 provided that if a landlord required land held by his protected tenant *bona fide* for his personal cultivation, he could terminate the tenancy giving one year's notice. In 1952, the Act was amended by inserting sub-sec. (2A) in the section which laid down that the right of the landlord under sub-sec. (1) shall be subject to the condition that the name of the landlord must stand in the Record-of-Rights on the 1st January, 1952. In the area in question, no Record-of-Rights had been prepared in 1952, and the condition was, *prima facie*, an unreasonable restriction upon the right of property conferred by Art. 19 (1) (f).

*Held*, that the amended provision, which contravened Art. 19 (1) (f) and was not saved by Art. 31A, must be held to be void.<sup>5</sup>

2. In the case of Jammu & Kashmir, the Ninth Schedule was made applicable (with additions) by the Constitution (Application to Jammu & Kashmir) Order, 1954, with effect from 14-5-54. Any alteration or addition made after that date in any Act included in that list will be outside the protection of Art. 31B.<sup>6,4</sup>

### Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part. **32.** (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, which-ever may be appropriate, for the enforcement of any of the rights conferred by this Part.

3. *Chimanlal v. State of Bombay*, A. 1954 Bom. 397.

4. *Venkatagiri v. State of A. P.*, (1959) S.C. [C.A. 188/58].

5. *Abdul Rahiman v. Vithal*, A. 1958 Bom. 94 (97-8), approved by *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

6. *Sant Singh v. State of J. & K.*, A. 1959 J. & K. 35 (F.B.).



<sup>7</sup>(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(2) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

**Scope of Art. 32: Enforcement of Fundamental Rights by Supreme Court.**

(i) The sole object of Art. 32 is the enforcement of the fundamental rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Art. 32, where no 'fundamental' right has been infringed.<sup>8</sup> For the same reason, no question other than relating to a fundamental right will be determined in a proceeding under Art. 32.<sup>9</sup>

(ii) What Art. 32 aims at is the enforcement of fundamental rights no matter whether the necessity arises out of an action of the executive or of the legislature.

(iii) Art. 32 is not directly concerned with the determination of the constitutional validity of a particular legislative enactment. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competency of the particular legislature as not being covered by any of the items in the legislative lists, but that it affects or invades his fundamental rights guaranteed by the Constitution of which he could seek enforcement by an appropriate writ or order.<sup>10</sup>

(iv) Since Art. 21 itself is confined to deprivation of liberty by the State, no petition under Art. 32 lies where a person has been detained by a private individual,<sup>11</sup> or where the petitioner has been affected by his voluntary action without any compulsion by the State.<sup>12</sup>

(v) A ground which has not been specifically taken in the petition under Art. 32 cannot be urged at the time of hearing.<sup>13,14</sup>

7. In its application to the State of Jammu and Kashmir, clause (3) of article 32 shall be omitted; and after clause (2), the following new clause shall be inserted namely:—

"(2A) without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by this Part."

8. *Cooverjee v. Excise Commr.* (1952-54) 2 C.C. 227 (231); *Ram Jayawar v. State of Punjab*, (1955) 2 S.C.R. 225 (239); *Sadhu Ram v. Custodian-Genl.*, (1955) 2 S.C.R. 1113 (1117); *Shantabai v. State of Bombay*, A. 1958 S.C. 532; (1959) S.C.R. 265; *Rameshwar v. Commrs.*, A. 1950 S.C. 498 (504).

9. *Amarsinghji v. State of Rajasthan*, A. 1955 S.C. 504.

10. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 809; (1950-51) C.C. 10 (13); A. 1950 S.C. 163.

11. *Vidya Verma v. Shiv Narain*, A. 1956 S.C. 108.

12. *Gopal Das v. Union of India*, (1955) 1 S.C.R. 773.

13. *Tropical Ins. Co. v. Union of India*, (1955) S.C.R. 517 (519).

14. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 589 (602).

### Applications under Arts. 32 and 226.

1. An application under Art. 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Art. 226.<sup>15</sup>

2. But the question whether an application under Art. 32 lies to the Supreme Court after an application under Art. 226 on the same grounds has been heard and rejected by the High Court, has not yet been decided.<sup>16</sup> In *M. K. Gopalan v. State of M. P.*,<sup>17</sup> the Court observed that it would not encourage, except for good reasons, the practice of "direct approach to the Supreme Court in matters which have been taken to the High Court and found against, without obtaining leave to appeal therefrom." But in the later case of *Purushottam v. Desai*,<sup>18</sup> the Court disposed of an application under Art. 32 on the merits, without entering into the question of maintainability of the application without obtaining a leave to appeal from the order of dismissal of the previous application under Art. 226 on the same grounds.

### Who may apply under Art. 32.

(i) Any person who complains of the infraction of any of the Fundamental Rights guaranteed by the Constitution is at liberty to move the Supreme Court,—including corporate bodies except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons.<sup>19</sup> Conversely, one cannot apply under Art. 32 in respect of a fundamental right which he does not possess.<sup>20</sup>

(ii) A company and its shareholders are separate legal entities. Hence, when some fundamental right of a company is infringed, it is the company and not any of its shareholders that must come forward to vindicate its rights.<sup>21</sup>

(iii) The rights that could be enforced under Art. 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief, and the proper subjects for investigation by the Court would be what rights, if any, of the petitioner have been violated by the impugned legislation. An exception to the above general proposition is admitted in the case of *habeas corpus*: not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating the person who has been illegally imprisoned.<sup>22</sup>

(iv) There are certain fundamental rights which are conferred on citizens alone, e.g., the rights under Art. 19.<sup>23</sup> A non-citizen cannot, therefore, apply for the enforcement of any such right.<sup>24</sup>

### Amplitude of Supreme Court's Jurisdiction under Art. 32.

1. The powers given to the Supreme Court under Art. 32, for the enforcement of Fundamental Rights are not confined to issuing prerogative

15. *Romesh Thappar v. State of Madras*, (1950-51) C.C. 40 (51) : (1950) S.C.R. 594.

16. *Aswini v. Arabinda*, A. 1952 S.C. 369.

17. *M. K. Gopalan v. State of M. P.*, (1955) 1 S.C.R. 168 (174).

18. *Purushottam v. Desai*, (1955) 2 S.C.R. 887 (892).

19. *Chiranji Lal v. Union of India*, (1950) S.C.R. 869.

20. *Rameshwar v. Commrs.*, A. 1959 S.C. 498.

21. *Cf. Sharma v. Srikrishna*, A. 1959 S.C. 305 (402).



gative writs only, and are not necessarily circumscribed by the conditions which limit the exercise of the prerogative writs.<sup>22</sup>

2. The language used in articles 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of the High Courts in India extend to issuing orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of the Constitution, there is no need to look back to the procedural technicalities of these writs in English law. The Court can make an order in the nature of these prerogative writs in all appropriate cases and in an appropriate manner, so long as the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law are observed.<sup>23</sup>

3. Art. 32 provides a guaranteed remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right, being included in Part III.<sup>24</sup> The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.<sup>25</sup>

4. Any law which renders nugatory or illusory the exercise of the Supreme Court's powers under Art. 22, is void.<sup>26</sup>

5. An application under Art. 32 cannot be thrown out simply because the proper direction or writ has not been prayed for. Thus, where an order in the nature of *mandamus* is sought in a particular form, nothing debars the Court from granting it in a different form. Art. 32 gives the Court a very wide discretion in the matter of framing the writs to suit the exigencies of particular cases.<sup>1</sup>

#### **How far existence of alternative remedy bars applications under Art. 32.**

Though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writs, this is not an absolute ground for refusing a writ under Art. 32 of the Constitution, because the powers given to the Supreme Court under Art. 32, are much wider and are not confined to issuing prerogative writs only.<sup>2</sup> The existence of an alternative remedy is no bar to the issue of a writ where a fundamental right has been infringed.<sup>24, 2</sup>

#### **Whether determination of facts possible in proceeding under Art. 32.**

Since the right to approach the Supreme Court is itself guaranteed under Art. 32, once the petitioner has, *prima facie*, established by

22. *Rashid Ahmad v. Municipal Board*, (1950) S.C.R. 566 : A. 1950 S.C. 163.

23. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250 : (1952-4) 2 C.C. 475 (477).

24. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

25. *Gopalan v. State of Madras*, (1950-51) C.C. 14 (134) : (1950) S.C.R. 88.

1. *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (35) : (1950) S.C.R. 869.

2. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 : A. 1950 S.C. 163. [See further, under Art. 226, *post*.]

3. *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122 : A 1954 S.C. 403.

his affidavit the breach of a fundamental right, the Court is bound to hear the application on the merits. The Court would not be justified to reject a petition under Art. 32 on the simple ground that it involved a determination of disputed questions of fact.<sup>1</sup> In a proceeding under Art. 32, the Supreme Court is not debarred from taking evidence of witnesses by issuing commission or examining witnesses in Court, where necessary.<sup>2</sup>

### Whether declaratory relief may be given under Art. 32.

1. It has already been stated (p. 193, *ante*) that the jurisdiction under Art. 32 is not confined to the issue of 'prerogative writs' and that the Supreme Court has a wide discretion in the matter of framing the writs to suit the exigencies of particular cases.<sup>3</sup>

2. In a number of cases under Art. 226, the High Courts have held<sup>4</sup> that declaratory relief cannot be had in a petition for a writ, and even the Supreme Court had early held<sup>5</sup> that a declaration that an impugned Act is invalid and a consequential relief by way of injunction are inappropriate to an application under Art. 32, and in *Umegh Singh v. State of Bombay*<sup>16</sup> the Court relegated the petitioner to filing a regular suit.

3. A declaration that the impugned Act was void was made in other cases<sup>11</sup> and in *Kochunni v. State of Madras*,<sup>4</sup> the Supreme Court has, on a review of the previous authorities laid down that the Court's powers under Art. 32 are wide enough to make even a declaratory order (with consequential relief by way of injunction), where that is the proper relief to be given to the aggrieved party. Such declaration has also been made in later decisions.<sup>12</sup>

### Practice and Procedure.

It would not be right to permit the Petitioner to raise questions which depend on facts which were not mentioned in his petition but were put forward in a rejoinder to which the respondents had no opportunity to reply.<sup>13</sup>

### Cl. (3): Power of Parliament to empower other Courts.

This clause enables Parliament to empower any Court, other than the Supreme Court, to issue the writs mentioned in cl. (2), for the purpose of enforcement of the fundamental rights. 'Other Courts' in this clause refers to Courts other than High Courts, for High Courts have constitutional power to issue the writs under Art. 226.<sup>14</sup>

4. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

5. *Chitranjit Lal v. Union of India*, (1950) S.C.R. 869 : A. 1951 S.C. 41.

6. *Dinesh v. State of M. B.*, A. 1953 M.B. 165.

7. *Narareddi v. State of Andhra*, A. 1957 Andhra 489.

8. *Collector of Monghyr v. Pratap Singh*, A. 1957 Pat. 102 (193) F.B.

9. *Venugopalan v. Vijayavada Municipality*, A. 1957 Andhra 833 (387).

10. *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 : A. 1955 S.C. 540.

11. *Ebrahim v. State of Bombay*, A. 1954 S.C. 229 : (1954) S.C.R. 933 (1941); *Express Newspaper v. Union of India*, A. 1958 S.C. 578 (643).

12. *Cf. Hamdard Dawakhana v. Union of India*, (1960) S.C.A. 314 (346).

13. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407).

14. *Cf. Govind v. State of Bhopal*, A. 1952 Bhopal 1 (3).



**33.** Parliament may by law determine to what extent any of the rights conferred by this Part

Power to Parliament to modify the rights conferred by this Part in their application to forces.

shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

**34.** Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in

Restriction on rights conferred by this Part while martial law is in force in any area.

the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

**1335.** Notwithstanding anything in this Constitution,—

Legislation to give effect to the provisions of this Part.

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

- (i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33, and article 34 may be provided for by law made by Parliament; and

**15.** In its application to the State of Jammu and Kashmir, in article 35,

- (i) references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954 (14th May, 1954);
- (ii) in clause (a), (i), the words, figures and brackets 'clause (3) of article 16, clause (3) of article 32' shall be omitted; and
- (iii) after clause (b), the following clause shall be added, namely:—  
“(c) no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order except as respects things done or omitted to be done before the expiration thereof.”

[In the absence of a fresh Order under Art. 370, Art. 35 (c), as inserted above, has ceased to have effect from 14-5-59].

- (ii) for prescribing punishment for those acts which are declared to be offences under this Part ;  
and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii) ;
- (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

*Explanation.*—In this article, the expression “law in force” has the same meaning as in article 372.<sup>14</sup>

#### PART IV<sup>1</sup>

### DIRECTIVE PRINCIPLES OF STATE POLICY

**36.** In this Part, unless the context otherwise requires  
Definition. “the State” has the same meaning as in Part III.

**37.** The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Application of the principles contained in this Part.

16. In its application to the State of Jammu and Kashmir, after article 35, the following new article shall be inserted, namely :—

“35A. *Saving of laws with respect to permanent residents and their rights.*—Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,—

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part.”

1. Not applicable to the State of Jammu and Kashmir.



### Utility of the Directive Principles.

The Articles included in Part IV of the Constitution (Arts. 36-51) contain certain Directives which it shall be the duty of the States to follow both in the matter of administration as well as in the making of laws. They embody the aims and objects of the State under the republican Constitution,<sup>2</sup> e.g., that it is to a 'Welfare State' and not a mere 'Police State'. The Directives, however, differ from the Fundamental Rights contained in Part III of the Constitution or the ordinary laws of the land, in the following respects:

(i) The Directives are not enforceable in the Courts and do not create any justiciable rights in favour of the individuals.<sup>3</sup>

(ii) The Directives require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.<sup>4</sup>

(iii) The Directives, *per se*, do not confer upon or take away<sup>5</sup> any legislative power from the respective Legislatures. Legislative competence must be sought from the Legislative Lists contained in the 7th Schedule of the Constitution.

(iv) The Courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.<sup>6</sup>

(v) The Courts are not competent to compel the Government to carry out any Directive, e.g., to provide for free compulsory education within the time limited by Art. 45.

On the other hand—

Though the Courts cannot declare any law to be void on the ground of contravention of any of the Directives, the Courts have already taken cognisance of the *tendency* of the Directives for the purpose of upholding social legislation. Thus, it has been held that—

(a) Restrictions, which are imposed on the exercise of Fundamental Rights for the purpose of securing the objectives, enjoined by any of the Directives, would be regarded as 'reasonable' restrictions within the meaning of cls. (2) to (6) of Art. 19.<sup>7,8</sup>

(b) Acquisition of land for the purpose of achieving the objects of the Directives contained in Art. 39 (b)-(c) should be held to be for a 'public purpose' within the meaning of Art. 31 (2).<sup>9</sup>

### Conflict between Directive Principles and Fundamental Rights.

In case of any conflict between the Fundamental Rights and the Directives, the Fundamental Rights shall prevail.

Though it is the duty of the State to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the State.<sup>10</sup> Thus, Art. 13 (2) prohibits the State from making any law which takes away or abridges the fundamental rights conferred by Art. III. The Directive Principles cannot override this categorical limitation upon the legislative power of the State.<sup>10,11</sup> Further, the directive principles, which are not enforceable by a court

2. *Lokenath v. State of Orissa*, A. 1952 Orissa 42 (47).

3. *In re Thomas*, A. 1952 Mad. 21.

4. *Mangru v. Commissioners of Budget Budget*, (1951) 87 C.L.J. 369.

5. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (664); *Fram Naserwanji v. State of Bombay*, A. 1951 Bom. 210.

6. *State of Bombay v. Balsara*, (1951) S.C.R. 682 : (1950-51) C.C. 308 (319).

7. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

8. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (Mahajan & Aiyar JJ.).

of law cannot override the fundamental rights which are expressly made enforceable by appropriate writs or orders under Art. 32<sup>9</sup>

But though the Directives cannot override the fundamental rights, in determining the scope and ambit of the fundamental rights the Court may not entirely ignore the Directive principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible.<sup>10,11</sup>

### Directives contained in other Parts of the Constitution.

Besides the Directives contained in Part IV, there are certain other Directives addressed to the State in other Parts of the Constitution. Those Directives are also non-justiciable. These are—

(a) Art. 350A enjoins every State and every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups.

(b) Art. 351 enjoins the Union to promote the spread of the Hindi language and to develop it so that it may serve as a medium of expression of all the elements of the composite culture of India.

**38.** The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

State to secure a social order for the promotion of welfare of the people.

**39.** The State shall, in particular, direct its policy towards securing—

Certain principles of policy to be followed by the State.

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;
- (d) that there is equal pay for equal work for both men and women ;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;
- (f) that childhood and youth are protected against exploitation and against moral and material abandonment.

9. *State of Madras v. Champakam*, (1951) S.C.R. 525 (531) : (1950-51) C.C. 183 (185).

10. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

11. Reference on the Kerala Education Bill, 1957, A. 1958 S.C. 956.



**40.** The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Organisation of village panchayats.

**41.** The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Rights to work, to education and to public assistance in certain cases.

**42.** The State shall make provision for securing just and humane conditions of work and for maternity relief.

Provision for just and humane conditions of work and maternity relief.

**43.** The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Living wage, etc., for workers.

**44.** The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Uniform civil code for the citizens.

**45.** The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Provision for free and compulsory education for children.

#### Scope of the Directive.

1. Not being justiciable, the present Article does not confer any legally enforceable right upon primary schools to receive grants-in-aid from the Government.<sup>12</sup>

2. This Directive does not empower the State to override the fundamental right of minority communities to establish educational institutions of their own choice under Art. 30 (1). It is possible for the State to discharge its obligation under the present Article through Government owned and aided schools.<sup>13</sup>

12. *Joseph v. State of Kerala*, A. 1958 Ker. 290 (297).

13. *Re. Kerala Education Bill*, A. 1958 S.C. 956 (986).

**46.** The State shall promote with special care the

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

**Art. 46: Promotion of educational and economic interests of the weaker sections.**

This section merely declares the objective of the State and, like other Directives, does not confer any justiciable right. Hence, a member of a backward class cannot obtain relief from the Court when he is denied any concession in school fees.<sup>14</sup>

Under the present Article, the State is at liberty to promote the educational and economic interests of the weaker sections of the people, but only so long as no fundamental rights are infringed.<sup>15</sup> Two provisions relating to Fundamental rights, viz., Arts. 15 and 29 (2) have, however, been amended (see p. 36, *ante*) by the Constitution (First Amendment) Act, 1951, in order to give effect to the present Article, notwithstanding the existence of those two Fundamental Rights, to the contrary. By virtue of this amendment, thus, it will be now possible for the State to make a special provision, e.g., to build a State colony, for the habitation of Harijans, notwithstanding the bar against discrimination on the ground of caste.<sup>16</sup>

**47.** The State shall regard the raising of the level of

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

**Prohibition.**

Restrictions imposed by a law providing for the prohibition of consumption or production of liquor upon the right conferred by Art. 19 (1) (f) are 'reasonable' restrictions, having regard to the Directive in Art. 47.<sup>17</sup>

**48.** The State shall endeavour to organise agriculture and

Organisation of agriculture and animal husbandry.

animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

14. *In re Thomas*, A. 1952 Mad. 21.

15. *State of Madras v. Champakam*, (1950-51) C.C. 183 (187) : (1951) S.C.R. 525.

16. *Cf. Jagwant v. State of Bombay*, A. 1952 Bom. 461.

17. *State of Bombay v. Balsara*, (1951) S.C.R. 682 : (1950-51) C.C. 308 (319).



**Prohibition of cow slaughter.**

The directive contained in the latter part of the Article is quite specific and enjoins the prohibition of slaughter of any of the species of cattle mentioned, irrespective of their utility from the standpoint of agriculture or animal husbandry,<sup>18</sup> and such prohibition cannot be held to be an unreasonable restriction upon the right conferred by Art. 19 (1) (g).<sup>19</sup> But the protection recommended by this part of the directive is confined to cows and calves and to those other animals which are *presently* or *potentially* capable of yielding milk or doing work as draught cattle but does not extend to cattle which were at one time milch or draught cattle but which have ceased to be such.<sup>14</sup>

**49. It shall be the obligation of the State to protect every**

Protection of monuments and places and objects of national importance.

monument or place or object of artistic or historic interest, *declared by or under law made by Parliament* to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

**Amendment.**—The words "declared by or under law made by" have been inserted before the words 'Parliament' and the words 'by law' have been omitted, by the **Constitution (Seventh Amendment) Act, 1956.**

**Object of amendment.**—The object has been thus explained in the Statement of Objects and Reasons:

Entry 67 of the Union List refers to "ancient and historical monuments and records, archaeological sites", etc., have been declared by Parliament by law to be of national importance". A large number of ancient monuments, archaeological sites, etc., have been declared to be of national importance by an Act of Parliament. It requires another Act of Parliament to make the slightest alteration in, or addition to, the lists in that Act, which seems to be an unduly cumbersome procedure. It is, therefore, proposed to amend the entry substituting for the words "declared by Parliament by law", the words "declared by or under law made by Parliament". The same amendment is also proposed to be made in the connected provisions,—entry 12 of the State List, entry 40 of the Concurrent List and article 49.

**50. The State shall take steps to**

Separation of judiciary from executive.

separate the judiciary from the executive in the public services of the State.

**51. The State shall endeavour to—**

Promotion of international peace and security.

- (a) promote international peace and security ;
- (b) maintain just and honourable relations between nations ;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and
- (d) encourage settlement of international disputes by arbitration.

18. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

19. *Buddhu v. Allahabad Municipality*, A. 1951 All 753.

**Art. 51: Promotion of International peace.**

This Article embodies the object of India in the international sphere. It does not lay down that international treaties or agreements entered into by India shall have the force of municipal law without appropriate legislation undertaken under Art. 253, *post*.

## PART V

## THE UNION

## CHAPTER I.—THE EXECUTIVE

*The President and Vice-President*

The President of India. **52.** There shall be a President of India.

**53.** (1) The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

**No theory of Separation of Powers underlying the Constitution.**

Though Art. 53 of our Constitution vests the executive power in the President, there is no similar provision in the Constitution vesting the legislative and judicial powers also, in other bodies. Further, by introducing the principle of ministerial responsibility, *i.e.*, by making the Executive head (the President or the Governor) liable to act on the advice of Ministers who are responsible to the Legislature, the Constitution of India has departed from the theory of Separation of Powers which underlies the American Constitution. Again, there are certain provisions in the Constitution itself which provide for the conferment of legislative powers on the Executive or the Judiciary and so on. Thus, Art. 140 provides that Parliament may confer upon the Supreme Court the power to make rules (which is a legislative power). Art. 357 provides that under a Proclamation of Emergency, it shall be competent for Parliament to provide that the powers of the State Legislature to make laws shall be exercised by the President.<sup>1</sup> The power of

1. In *re Delhi Laws Act*, 1912 (1951) S.C.R. 747 (835, 884, 943-5, 965).



the President to make Ordinances during recess of the Legislature is another instance of legislative power in the hands of the Executive.

But though our Constitution has not strictly adhered to the doctrine of Separation of Powers,<sup>1</sup> it does not follow that under our Constitution any organ of the Government can encroach upon the constitutional powers of any other organ<sup>2</sup> or delegate its constitutional functions to any other organ or authority. A written Constitution, by its very nature, involves a distribution of powers. Though the legislative and executive powers are not expressly vested by the Constitution in the Legislature and the Judiciary expressly, it is clear from the different provisions of the Constitution that, barring specified exceptions, the power of making laws shall be exercised by Parliament and the Legislatures of the States and the power of adjudication and interpretation of the Constitution shall be exercised by the Courts. This is a constitutional trust imposed by the Constitution upon the Legislature and the Courts which they cannot, themselves delegate to others.<sup>3</sup>

### 'Executive power'.

1. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitution or of any law.<sup>4</sup>

2. The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.<sup>5</sup>

3. By reason of Art. 298, *post*, it also includes—(a) the carrying on of trading operations; (b) the holding and disposing of property; (c) the making of contract for any purpose.

### Exercise of executive power not dependent on prior legislation.

1. It is one of the functions of the Executive to execute the laws. This does not mean, however, that the executive function is confined to the execution of laws or that in order to enable the executive to function in respect of any subject there must be a law already in existence. Specific legislation, may, of course, be necessary to incur expenditure of the public funds or to encroach upon private rights, which cannot, under the Constitution, be done without legislation. But, apart from this, it cannot be held that in order to undertake any function, such as entering into any trade or business, the Executive must obtain prior legislative sanction.<sup>6</sup>

2. In the exercise of its executive power, therefore a Government may do any act provided—

(i) It is not an act assigned by the Constitution to any other authority or body such as the Legislature or the Judiciary or the Public Service Commission (*e.g.*, matters specified in Art. 3).<sup>7</sup>

(ii) It is not contrary to the provisions of any law.

(iii) It does not encroach upon or otherwise infringe the legal rights of an individual.<sup>8</sup>

3. On the same principle, it has been held<sup>9</sup> that the making of a treaty is an executive act and the municipal courts cannot question the validity of a treaty entered into by the Government of India, in

2. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (236).

3. *Nirmal v. Union of India*, A. 1959 Cal. 506 (515).

4. *Moti Lal v. Uttar Pradesh Govt.*, A. 1951 All. 257 (F.B.).

exercise of its power under Art. 53, on the ground that there was no legislation to support it.

Legislation may, however, be required to give effect to a treaty—

(a) Where it provides for payment of money to a foreign power,<sup>5</sup> which must be withdrawn from the Consolidated Fund of India.

(b) Where the treaty affects the private rights of a citizen of India.<sup>6</sup> Thus, though no legislative sanction is required for 'acquiring' property ceded to India by a foreign power, an amendment of the Constitution itself would be necessary to cede Indian territory to a foreign State.<sup>7</sup>

**'Officers subordinate to him'.**

Ministers are officers subordinate to the President [Art. 53 (1)] or the Governor<sup>8</sup> [Art. 154 (1)], as the case may be.

Election of President.

**\*54.** The President shall be elected by the members of an electoral college consisting of—

- (a) the elected members of both Houses of Parliament ; and
- (b) the elected members of the Legislative Assemblies of the States.

**\*55.** (1) As far as practicable, there shall be uniformity in Manner of election the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner :—

- (a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly ;
- (b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one ;

5. *Re Berubari Union*, (1960) S.C. (unrep.).

6. *Emp. v. Sibnath*, A. 1945 P.C. 156.

7. *Tara Singh v. Director*, A. 1958 Punj. 302 (304).

8. In their application to the State of Jammu and Kashmir, in articles 54 and 55, references to the elected members of the House of the People and to each such member shall include references to the representatives of the State of Jammu and Kashmir in that House; and the population of the State shall be deemed to be forty-four lakhs and ten thousand.



- (c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

*Explanation.*—In this article, the expression "population" means the population as ascertained at the preceding census of which the relevant figures have been published.

**56.** (1) The President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

- (a) the President may, by writing under his hand addressed to the Vice-President, resign his office;
- (b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61;
- (c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

**57.** A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

**58.** (1) No person shall be eligible for election as President unless he—

- |   |   |
|---|---|
| Qualifications for election as President. | (a) is a citizen of India,  |
|   | (b) has completed the age of thirty-five years, and                   |
|   | (c) is qualified for election as a member of the House of the People. |

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India

or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor<sup>9</sup> . . . of any State or is a Minister either for the Union or for any State.

**59.** (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

**60.** Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

swear in the name of God

“I, A. B., do \_\_\_\_\_ solemnly affirm

that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

**61.** (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

<sup>9</sup> The words ‘or Rajpramukh or Uparajpramukh’ have been omitted by the Constitution (Seventh Amendment) Act, 1956.



(2) No such charge shall be preferred unless—

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

**62.** (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill causal vacancy.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after,

and in no case later than six months from, the date of occurrence of the vacancy ; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

The Vice-President of India.

**63.** There shall be a Vice-President of India.

**64.** The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit ;

The Vice-President to be *ex-officio* Chairman of the Council of States.

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under article 97.

**65.** (1) In the event of the occurrence of any vacancy

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

**66.** (1) The Vice-President shall be elected by the

Election of Vice-President.

members of both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President unless he—

(a) is a citizen of India ;

(b) has completed the age of thirty-five years ; and

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purpose of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the



Governor . . . . .<sup>10</sup> of any State or is a Minister either for the Union or for any State.

**67.** The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

- (a) a Vice-President may, by writing under his hand addressed to the President, resign his office ;
- (b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People ; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution ;
- (c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**68.** (1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

**69.** Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

"I, A. B., do <sup>swear in the name of God</sup> solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

10. The words "or Rajpramukh or Uparajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

Discharge of President's functions in other contingencies.

**70.** Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

**71.** (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.

**Cl. (1): Decision of doubts and disputes relating to Presidential election.**

The jurisdiction under this clause can be exercised by the Supreme Court only after the election has been over and a candidate has been declared elected.<sup>11</sup> A petition presented before that is liable to be rejected as premature.<sup>12</sup>

**72.** (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exer-

11. *Narayan v. Election Commn.*, (1957) S.C.R. 1081 (1090).



cisable by the Governor . . . .<sup>12</sup> of a State under any law for the time being in force.

**Pardoning Power.**—See under Art. 161, *post*.

**73.** (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—  
 Extent of executive power of the Union.

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State<sup>13</sup> . . . . .<sup>14</sup> to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

#### **Art. 73: Extent of executive power of the Union.**

(i) The Union shall have exclusive executive power for (a) the administration of laws made by Parliament under its exclusive powers; (b) the exercise of its treaty powers. [Cf. art. 253].

By virtue of Cl. 1 (a), the executive power of the Union shall be co-extensive with the legislative power of the Union Parliament. In other words, it will extend over the whole of the territory of India, with respect of the matters enumerated in Lists I and III of the 7th Schedule. But this is subject to the two exceptions engrafted in the Proviso to Cl. (1), and in Cl. (2).

(ii) The Proviso to Cl. (1) says that executive authority in regard to matters in the Concurrent List shall be ordinarily left to the States, for Parliament shall be entitled to provide that in exceptional cases the executive power of the Union shall also extend to these subjects.

12. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

13. In its application to the State of Jammu and Kashmir, in the proviso to clause (1) of article 73, the words "or in any law made by Parliament" shall be omitted.

14. The words "specified in Part A . . . First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

Whether specific legislation is required for the exercise of executive power relating to a particular subject.

1. The Supreme Court has held<sup>15</sup> that under *our* Constitution, the functions of the Executive are not confined to the execution of laws made by the Legislature and already in existence. Arts. 73 and 162 indicate that the powers of the Executive of the Union and of a State are co-extensive with the legislative power of the Union or of a State, as the case may be. While the Executive cannot act against the provisions of a law, it does not follow that in order to enable the Executive to function relating to a particular subject, there must be a law already in existence, authorising such action.<sup>16</sup>

2. Once a law is passed, the executive power can be exercised only in accordance with such law so far as it goes, but the Government is not debarred from exercising its executive power merely because a Bill relating to the subject is pending before the Legislature.<sup>17</sup>

3. Legislation may, however, be required where the Constitution itself provides that the act can be done only by legislation, e.g., for the imposition of a tax [Art. 265]; for expenditure of money Art. 266 (3).<sup>18</sup>

**74.** (1) There shall be a Council of Ministers with the Council of Ministers to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

#### Relation between the President and the Council of Ministers.

Though we have an elected President, the present Article introduces the same system of parliamentary executive as in England and reduces the President to a formal or constitutional head of the executive, the real powers being exercised by the Council of Ministers.<sup>19</sup> All the powers that are vested by the Constitution in the President, are expected to be exercised on the advice of the Ministers responsible to the Legislature as in England, though there is no obligatory provision in the Constitution itself, to this effect.

**75.** (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

Other provisions as to Ministers.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

15. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (232-6). [Specific legislation is not required for enabling the State to carry on a trade or business].

16. *Joseph v. State of Kerala*, A. 1955 Ker. 290 (301).



(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

### *The Attorney-General for India*

**76.** (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

### *Conduct of Government Business*

**77.** (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

Conduct of business of the Government of India. (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

**Execution of orders and instruments.**—See under Art. 166, *post*.

**78.** It shall be the duty of the Prime Minister—

Duties of Prime Minister as respects the furnishing of information to the President, etc.

- (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation ;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for ; and
- (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

**CHAPTER II.—PARLIAMENT**

*General*

**79.** There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Constitution of Parliament.

**80.** (1) The Council of States shall consist of—

Composition of the Council of States.

- (a) twelve members to be nominated by the President in accordance with the provisions of clause (3) ; and
- (b) not more than two hundred and thirty-eight representatives of the States and of the *Union Territories*.<sup>17</sup>

(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the *Union Territories*<sup>17</sup> shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely :—

Literature, science, art and social service.

(4) The representatives of each State \* \* \* \* \*<sup>18</sup> in the Council of States shall be elected by the elected members of the

17. Inserted by the Constitution (Seventh Amendment) Act, 1956.

18. The words and letters "specified in Part A or Part B of the First Schedule" have been omitted by the Constitution (Seventh Amendment), Act, 1956.



Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the *Union Territories*<sup>19</sup> in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

**Amendment.**—The changes made by the **Constitution (Seventh Amendment) Act, 1956** are indicated in italics.

#### Effects of Amendment.

(a) In the original Constitution, representation in the Council of States was confined to the States in Parts A, B and C. It has now been extended to all the Union territories which include the Islands which were included in Part D of the First Schedule.

(b) Consequential changes in the allocation of seats have been made in the Fourth Schedule, maintaining in tact the original formula of "one seat per million for the first five millions and one seat for every additional two millions or part thereof exceeding one million."<sup>20</sup>

Composition of the House of the People <sup>21-22</sup>**81.** (1) *Subject to the provisions of article 331, the House of the People shall consist of—*

(a) *not more than five hundred members chosen by direct election from territorial constituencies in the States, and*

(b) *not more than twenty members to represent the Union territories, chosen in such manner as Parliament may by law provide.*

(2) *For the purposes of sub-clause (a) of clause (1),—*

(a) *there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States ; and*

(b) *each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.*

19. Substituted for the words 'States specified in Part C of the First Schedule', by the Constitution (Seventh Amendment) Act, 1956.

20. Statement of Objects & Reasons of the Constitution (Ninth Amendment Bill), 1956.

21. Substituted by the Constitution (Seventh Amendment) Act, 1956.

22. Article 81 shall apply to the State of Jammu and Kashmir subject to the modification that the representatives of that State in the House of the People shall be appointed by the President on the recommendation of the Legislature of the State.

(3) *In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.*

**Amendment.**—Art. 81 has been substituted by the **Constitution (Seventh Amendment) Act, 1956**, for the original Article.

#### Effects of Amendment.

(a) The provision for the grouping of States for the purpose of forming territorial constituencies, in cl. (1) (b), has been omitted, since after reorganisation each of the States will be large enough to be divided into a number of constituencies and will not permit of being grouped together with other States for this purpose or being "formed" into a single territorial constituency.<sup>23</sup>

(b) The principle of uniformity of representation amongst the States *inter se* and as amongst territorial constituencies of the same State has been substituted for the numerical minimum prescribed in the original cl. (1) (b).

(c) Provision has been made for representation of the Union territories, to the extent of 20 members.

<sup>24</sup>**82.** *Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine :*

Re-adjustment  
after each census.

*Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.*

**83.** (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Duration of Houses  
of Parliament.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House :

*Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.*

23. Statement of Objects and Reasons to the Constitution (Ninth Amendment) Bill, 1956.

24. Substituted by the Constitution (Seventh Amendment) Act, 1956



84. A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

- Qualification for membership of Parliament.
- (a) is a citizen of India ;
  - (b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age ; and
  - (c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

25 85. (1) *The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.*

Sessions of Parliament, prorogation and dissolution.

(2) *The President may from time to time—*

- (a) *prorogue the Houses or either House ;*
- (b) *dissolve the House of the People.*

86. (1) *The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.*

Right of President to address and send messages to Houses.

(2) *The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.*

87. (1) *At the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.*

Special address by the President.

(2) *Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address" \* \* \* \*.*

— 25. Substituted by the Constitution (First Amendment) Act, 1951, s. 6, for the original article.

1. Substituted, *ibid*, s. 7, for "every session".

2. The words "and for the precedence of such discussion over other business of the House" were omitted by the Constitution (First Amendment) Act, 1951, s. 8.

**88.** Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Rights of Ministers and Attorney-General as respects Houses.

### *Officers of Parliament*

**89.** (1) The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

The Chairman and Deputy Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

**90.** A member holding office as Deputy Chairman of the Council of States—

Vacation and resignation of, and removal from, the office of Deputy Chairman.

(a) shall vacate his office if he ceases to be a member of the Council ;

(b) may at any time, by writing under his hand addressed to the Chairman, resign his office ; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

**91.** (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.



**92.** (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 91 shall apply in relation to every such sitting as

they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

**93.** The House of the People shall, as soon as may be,

The Speaker and Deputy Speaker of the House of the People.

choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to

be Speaker or Deputy Speaker, as the case may be.

**94.** A member holding office as Speaker or Deputy Speaker of the House of the People—

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

(a) shall vacate his office if he ceases to be a member of the House of the People ;

(b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office ; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

**95.** (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

**96.** (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

**97.** There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

**98.** (1) Each House of Parliament shall have a separate secretariat staff:

Secretariat of  
Parliament.

Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretariat staff of either House of Parliament.



(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

### *Conduct of Business*

**99.** Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

**100.** (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

### *Disqualifications of Members*

**101.** (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State.....<sup>3</sup> and if a person is chosen a member both of Parliament and of a House of the Legislature of a State . . . ,<sup>3</sup> then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant :

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

#### Cl. (3) (a) : 'Becomes'.

This word refers to disqualifications incurred by a member after he was elected.<sup>4</sup>

#### Cl. (3) (b) : Resignation.

The Travancore High Court has held<sup>5</sup> that the letter of resignation must proceed from the member and that the resignation must relate to the membership held by the person who sends the same, and that it must be the result of a voluntary act of his. A person cannot resign *prospective* status which he or she may not get in the ordinary course of events. The mere receipt by the Speaker of a letter of resignation will not cause that member's seat to be vacant. It is open to the Speaker to enquire whether that letter is a genuine letter or a forged letter, or one obtained by force or fraud. It has been held further that it is within the jurisdiction of the Court to enquire whether a letter of resignation is a void document on any of the above grounds and to direct the Speaker to allow member to take his or her seat, upon the declaration that he or she has not lost her seat by the alleged resignation.<sup>6</sup>

#### Cl. (4) : Absence for sixty days.

While the circumstances mentioned in cl. (3) of Art. 101 automatically cause a vacancy, the absence under Art. 101 (4) causes a vacancy only if the House considers it fit to unseat the member and declares the seat vacant.<sup>7</sup>

3. The words "specified in Part A . . . First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

4. *Election Commn. v. Venkata*, (1952-54) 2 C.C. 450 (453) : (1953) S.C.R. 1144.

5. *Thankamma v. Speaker*, A. 1952 T.C. 166.

6. *Ansumali v. State of W. B.*, A. 1952 Cal. 632 (637).



**102.** (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder ;
- (b) if he is of unsound mind and stands so declared by a competent court ;
- (c) if he is an undischarged insolvent ;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State ;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

#### Scope of Art. 102.

This article lays down the same set of disqualifications for election as well as continuing as a member.<sup>7</sup> In other words, it provides for both pre-existing and supervening disqualification.<sup>8</sup>

#### Disqualification for membership.

Preventive detention is not a disqualification under this Article or under the Representation of the People Act, 1951.

**'Office of profit'.**—See under Art. 191 (1) (a), *post*. The words 'under any local or other authority' which occur at the end of Arts. 58 (2) and 66 (4) are absent in Art. 102 (1) (a). In the result, though the holding of an office of profit under an authority subject to the control of the Government is a disqualification for the office of the President or the Vice-President, it is not a disqualification for membership of the Legislature.<sup>9</sup>

**103.** (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

7. *Abdul Shakoor v. Election Tribunal*, A. 1958 S.C. 52 (35).

**'Has become'.**

These words refer to disqualifications incurred by the member, subsequent to his election.<sup>8</sup> The President or the Commission has, therefore, no jurisdiction to inquire into disqualifications which arose prior to election.<sup>9</sup>

**104. If a person sits or votes as a member of either House**

Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified.

of Parliament before he has complied with the requirements of article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each day on

which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

**'Not qualified or disqualified'.**

These words cover both pre-election and supervening disqualification.<sup>4</sup>

*Powers, Privileges and Immunities of Parliament and its Members***105. (1) Subject to the provisions of this Constitution**

Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.

and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

8. *Election Commn. v. Venkala*, (1952-54) 2 C.C. 450 (453).



**Cl. (1): Freedom of Speech :**

'Subject to the . . . Constitution'.

This means that the right of freedom of speech is subject to the restrictions imposed by Arts. 19 (1) (a), 118 and 121,<sup>9</sup> *post*.

But these restrictive words are omitted in cls. (2) and (3).

**Cl. (2): Immunity from legal action.**

The restrictive words "subject to the provisions of this Constitution . . . ." at the beginning of cl. (1) have been omitted from cl. (2).<sup>10</sup> It means that while the freedom of speech within the House is subject to the restrictions imposed by Arts. 19 and 121 or by the relevant Rules of the House, no action in a Court of law lies for violation of any of the foregoing provisions, say, for contempt of Court, defamation, etc. The remedy against such utterances is the power in the hands of the Speaker to prevent or to take action against the violation of these provisions.<sup>11,12</sup>

**'Publication by or under the authority of a House'.**

1. The immunity under cl. (2) is confined to a publication by or under the authority of a House. A newspaper is not privileged under this clause even though its report be faithful, unless it is authorised by the House.<sup>13</sup>

2. Even a member, who has absolute immunity for anything said within the House, has no immunity if he *causes* his speech to be published in a newspaper.<sup>14</sup> Of course, he is not liable if a newspaper publishes his speech without any inducement from him.<sup>15</sup>

3. The immunity extends to the publication of the 'proceedings' of the House which include any *formal* action of the House, but not questions which have been disallowed.<sup>16</sup>

4. The House has an absolute privilege to prohibit the publication of its proceedings entirely or such part of its proceedings as has been directed to be expunged.<sup>9</sup> Such part of the proceedings as is directed to be expunged does not form part of the 'proceedings' of the House and a publication thereof without the authority of the House constitutes contempt.<sup>9</sup>

**Cl. (3): Privileges as in England.**

1. No such legislation, as is referred to in this clause has yet been undertaken by Parliament.<sup>17</sup> Hence, in matters outside cls. (1) and (2), the privileges of Parliament and its members are the same as those of the House of Commons and its members, as they existed at the commencement of this Constitution.<sup>9</sup>

2. Thus, it has been held that, as in England, the immunity of members of Parliament from arrest does not extend to cases of preventive detention.<sup>18,19</sup> For the same reason, though during his period of detention under the Preventive Detention Act, a member has a right to correspond with the Legislature as a sitting member, he is not entitled to attend the sittings of House.<sup>16,18</sup>

9. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407).

10. *Surendra v. Nabakrishna*, A. 1958 Orissa 168 (175).

11. *Suresh v. Punit*, A. 1951 Cal. 176.

12. *Jatish v. Harisadhan*, (1956) 60 C.W.N. 971.

13. *Venkateswarlu v. D. M.*, (1950) 2 M.L.J. 207 : A. 1951 Mad. 269.

14. *Ansumali v. State of W. B.*, (1952) 56 C.W.N. 711 (716).

15. *Kunjan v. State*, A. 1955 T.C. 154.

16. *Ananda Nambiar, In re*, (1952) 1 M.L.J. 1 : A. 1952 Mad. 117.

3. In short, the immunity from arrest applies only to arrest under civil process and does not extend to arrest under the criminal law.<sup>17</sup>

4. The immunity from arrest under civil process exists during a session of Parliament or of the State Legislature (as the case may be) and forty days before and after each session. The privilege cannot be claimed when the Legislature has been prorogued and has not yet been summoned for the next session.<sup>18</sup>

5. Where a member has been arrested in breach of this privilege, he is entitled to be released by a proceeding for *habeas corpus*.<sup>19</sup>

6. The provisions of the present clause are not subject to Art. 19 or any other provision of the Constitution.<sup>20</sup> In the result, the privileges of the House of Commons, so long as they are applicable in India are not liable to be invalid on the ground of contravention of any of the fundamental rights, e.g., Art. 19 (1) (a)<sup>21</sup> though, practically, if Parliament [or the State Legislature, under Art. 194 (3)] chooses to make a law under the present clause, such law cannot abridge any of the fundamental rights by reason of Art. 13 (2).<sup>22</sup>

7. The House has an absolute right to exclude a stranger from its proceedings;<sup>23</sup> or to expunge any part of its proceedings and to punish for contempt the publication of such expunged matter.<sup>24</sup>

#### Parliamentary Privileges and the Courts.

1. Since the privileges of each House of our Parliament [Art. 105 (3) and of a State Legislature [Art. 194 (3)] are the same as those of the English House of Commons, it follows that—

(a) Each House is the sole judge of the question whether any of its privileges has, in a particular case, been infringed,<sup>25</sup> and the Courts have no jurisdiction to interfere with the decision of the House on this point.<sup>26</sup>

(b) Each House has the power to punish for breach of its privileges or for contempt. But in so doing, it does not act as a court of law.<sup>27</sup>

(c) No House of the Legislature has, however, the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.<sup>28,29</sup>

#### Arts. 19 (1) (a) and 105 (3) and 194 (3).

According to the principle of harmonious construction between different parts of the Constitution, it has been held that the provisions of Art. 19 (1) (a) which are general, must yield to Art. 105 (3) and 194 (3), which are particular provisions relating to the Legislature. The Editor of a newspaper cannot, accordingly, claim a right to publish those portions of a speech in Parliament which have been directed to be expunged by the Speaker.<sup>30</sup>

**106.** Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament

Salaries and allowances of members. by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

17. *Venkateswarlu v. D. M.*, A. 1951 Mad. 269.

18. *Ansumali v. State of W. B.*, (1952) 56 C.W.N. 711 (720).

19. *Sharma v. Sri Krishna*, A. 1950 S.C. 395 (413).

20. *Raj Narain v. Altmaram*, A. 1954 All. 319.



*Legislative Procedure*

**107.** (1) Subject to the provisions of articles 109 and 117

Provisions as to introduction and passing of Bills. with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

**108.** (1) If after a Bill has been passed by one House and transmitted to the other House—

(a) the Bill is rejected by the other House ; or  
 Joint sitting of both Houses in certain cases.

(b) the Houses have finally disagreed as to the amendments to be made in the Bill ; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill.

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified

in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses :

Provided that at a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill ;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed ;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Special procedure  
in respect of Money  
Bills.

**109.** (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.



(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

**110.** (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

Definition of  
"Money Bills."

- (a) the imposition, abolition, remission, alteration or regulation of any tax ;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India ;
- (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund ;
- (d) the appropriation of moneys out of the Consolidated Fund of India ;
- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure ;
- (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State ; or
- (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

**111.** When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom :

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

*Procedure in financial matters*

**112.** (1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

- (a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of India ; and
- (b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India, and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—

- (a) the emoluments and allowances of the President and other expenditure relating to his office ;
- (b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People ;
- (c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;



- (d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court ;
- (ii) the pensions payable to or in respect of Judges of the Federal Court ;
- (iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a *Governor's Province of the Dominion of India*<sup>21</sup> ;
- (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India ;
- (f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal ;
- (g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

**113.** (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.

**114.** (1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

- (a) the grants so made by the House of the People ; and
- (b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

21. Substituted for the words "corresponding to . . . First Schedule", by the Constitution (Seventh Amendment) Act, 1956.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

**115. (1) The President shall—**

(a) if the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when

Supplementary, additional or excess grants.  
a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

Votes on account, votes of credit and exceptional grants.

**116. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—**

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the



passing of the law in accordance with the provisions of article 114 in relation to that expenditure ;

- (b) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;
- (c) to make an exceptional grant which forms no part of the current service of any financial year,

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

**117.** (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States :

Special provisions as to financial Bills. Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

### *Procedure Generally*

**118.** (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.

#### Rules of Procedure.

1. 'Subject to the provisions of the Constitution,' each House of Parliament or of a State Legislature [Art. 208, *post*] may make Rules for regulating its procedure or conduct of business,<sup>22</sup> as well as ancillary matters.<sup>23</sup>

2. Courts have no power to interfere with such Rules or their administration<sup>24</sup> unless there is a contravention of some provision of the Constitution.<sup>25</sup>

3. Each House has the absolute right of interpreting its Rules and the Courts have no jurisdiction to interfere with the Speaker's discretion in the matter of application of the Rules relating to the internal management of the House, e.g., whether a motion related to a matter of 'recent occurrence'<sup>26</sup> or whether a Committee of Privileges reported in time.<sup>27</sup>

4. The Rules framed under the present Article [or Art. 208] (if otherwise valid) constitute 'procedure established by law' within the meaning of Art. 21.<sup>28</sup>

**119.** Parliament may for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made is inconsistent with any rule made by a House of Parliament under clause (1) of article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail.

22. *Godavari v. Nandkishore*, A. 1953 Orissa 111.

23. *Cf. Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

24. *Sharma v. Sri Krishna*, A. 1950 S.C. 395.



**120.** (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, Language to be used in Parliament. business in Parliament shall be transacted in Hindi or in English :

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

**121.** No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

**122.** (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

**Cl. (1): Courts not to inquire into irregularity of procedure in Parliament.**

1. It is clear from the above clause, that our Courts would not be entitled to question the validity of any 'proceeding' in Parliament on the ground of irregularity of 'procedure'. Thus, the Courts cannot invalidate an Act on the ground that changes were introduced into the Bill by the Select Committee in contravention of the Rules of Procedure and business of the House, or that the members<sup>25</sup> or Speaker<sup>1</sup> had not taken the oath.

2. Where a bill is duly endorsed by the Speaker as passed, it cannot be questioned in the Courts on the ground that proceedings of the Legislature do not record that the bill was formally put to the House under the rules of business and carried by it.<sup>2</sup>

3. But the immunity from judicial interference is confined to matters of *irregularity of procedure*. There would be no immunity if

25. Cf. *Ram Dubey v. Govt. of M. B.*, A. 1952 M.B. 57 (74).

1. *Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

2. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (266).

the proceedings are held in defiance of the mandatory provisions of the Constitution or by exercising powers which the Legislature does not under the Constitution possess.<sup>2a</sup>

4. The question whether the Speaker himself has been duly elected according to the provisions of the Constitution is not a question relating merely to irregularity of proceedings in the House, and a proceeding for *Quo Warranto* lies to challenge his right to the office.<sup>3</sup>

#### CL(2): Powers exercisable by an officer of the Legislature.

1. Even an erroneous decision or interpretation of the Rules of Procedure<sup>4</sup> by the Speaker cannot be the subject-matter of scrutiny in a Court of law. The High Court cannot act as a Court of appeal or revision against the Legislature or the rulings of the Speaker.<sup>5</sup>

2. By reason of this provision, the High Court cannot give a direction upon the Speaker on the question whether the discussion on the address of the Governor would come under Art. 176 (2) or would be treated as a discussion of an ordinary resolution.<sup>6</sup>

3. No writ will lie against the Speaker or other officer of the Legislature to interfere with the proceedings of the Legislature<sup>7</sup> (e.g., to prevent a resolution from being moved) or to restrain the Legislature from enacting any legislation even if it be *ultra vires*<sup>8,9</sup> or unconstitutional.<sup>7</sup>

If, however, a law is passed or a motion or resolution carried, which is not in accordance with the Constitution, it can be declared invalid by the Courts.<sup>7</sup>

4. The immunity is restricted to matters of 'procedure' and would not extend to any matter relating to the Constitution of the Legislature itself, e.g., the absence of a notification under s. 74 of the Representation of the People Act, 1951.<sup>10</sup>

#### 'Conduct of business'.

1. It has been held by the Travancore High Court that the taking or administering of the oath under Art. 99 or 188 of the Constitution is not an item of 'conduct of business' within the meaning of Art. 122 (2) or 212 (2) but is only a condition precedent to entitle the members to sit in the assembly and conduct the business. Hence, a wrongful refusal by the Speaker to allow a member to take the oath can be interfered with by the Court. It has also been held that where the Speaker is authorised by the President or Governor to administer the oath under Art. 99 or 188, he discharges the function not as an 'officer' of the Assembly and that, in the discharge of this function, he cannot claim the protection given by Art. 122 (2) or 212 (2).<sup>11</sup>

2. A point of order raised by a member relates to the conduct of business of the Assembly.<sup>12a</sup> So also is the giving of notice of a question.<sup>12,13</sup>

2a. *Anand v. Ram Sahay*, A. 1952 M.B. 31 (44).

3. *Nesamony v. Varghese*, A. 1952 T.C. 66.

4. *Harendra v. Dev Kanta*, A. 1958 Assam 160 (165).

5. *Rajnarin v. Atmaram*, A. 1954 All. 319.

6. *Saradhakar v. Orissa Legislative Assembly*, A. 1952 Orissa 234.

7. *Hem Chandra v. Speaker*, A. 1956 Cal. 378 (384).

8. *Shrikishen v. State*, A. 1956 Hyd. 186.

9. *Chotey Lal v. State of U. P.*, A. 1951 All. 228.

10. *Cf. Vinod v. State of H. P.*, A. 1959 S.C. 223.

11. *Thankamma v. T. C. Assembly*, A. T.C. 166 (169). (The soundness of both these propositions, it is submitted, is open to question).

12-25. *Godavaris v. Nandkishore*, A. 1953 Orissa 111.



## CHAPTER III.—LEGISLATIVE POWERS OF THE PRESIDENT

**123.** (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

Power of President to promulgate Ordinances during recess of Parliament.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

*Explanation.*—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

*Comments.*—See under Art. 213, *post*.

## CHAPTER IV.—THE UNION JUDICIARY

**124.** (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

Establishment and constitution of Supreme Court.

(2) Every Judge of The Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession ;  
or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession ;  
or

(c) is, in the opinion of the President, a distinguished jurist.

*Explanation I.*—In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

*Explanation II.*—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

**125.** (1) There shall be paid to the Judges of the Supreme Salaries, etc., of Court such salaries as are specified in the Judges. Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule :



Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

**126.** When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

**127.** (1) If at any time there should not be a quorum of the Judge of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties of a Judge of the Supreme Court.

**128.** Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court :

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

**129.** The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

### Power to punish for contempt of itself.

1. Though as a Court of Record the Supreme Court would have the power to punish for contempt of itself, Art. 129 specifically mentions this power in order to remove any doubts. This is a summary power.<sup>1</sup>

2. The object of this power to punish is not the protection of the Judges personally from imputations to which they may be exposed as individuals,<sup>2</sup> but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired. Hence,—

(i) The power to punish for scandalising the Court is a weapon to be used sparingly and always with reference to the administration of justice<sup>3</sup> and not for vindicating personal insult to a judge, not affecting the administration of justice.

There are two primary considerations which should weigh with the Court in such cases, viz.—(a) whether the reflection on the conduct or character of the Judge is within the limits of fair and reasonable criticism, and (b) whether it is a mere libel or defamation of the Judge or amounts to a contempt of the court.<sup>4</sup>

Where the question arises whether a defamatory statement directed against a Judge is calculated to undermine the confidence of the public in the competency or integrity of the Judge or is likely to deflect the court itself from a strict and unhesitant performance of its duties, all the surrounding circumstances under which the statement was made and the degree of publicity that was given to it would be relevant circumstances. The question is not to be determined solely with reference to the language or contents of the statement made. Mere publication to a third party, which would be sufficient to establish an ordinary libel may not be conclusive for establishing contempt. That would depend upon the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public and thereby lead to an interference with the administration of justice.<sup>5,6</sup>

"Although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character."<sup>7</sup>

At any rate, defamation of a Judge who has retired cannot be punished as contempt of Court.<sup>8</sup>

(ii) Fair and reasonable criticism of a judicial act in the interest of the public good does not amount to contempt.

But the limits of *bona fide* criticism are transgressed when improper motives are attributed to judges and this cannot be viewed with placid equanimity by a Court in a proceeding for contempt. Imputations made against judicial officers without reasonable care and caution cannot be said to be *bona fide*.<sup>9</sup>

Thus, it is a gross contempt to impute that Judges of the highest Court of Justice acted on extraneous considerations in deciding a case.<sup>9</sup>

3. This is an extraordinary power which must be used sparingly, but where the public interest demands it the Court will not shrink from

1. *Hiralal v. State of U. P.*, A. 1954 S.C. 743.

2. *Brahma Prakash v. State of U. P.*, (1953) S.C.R. 1169.

3. *Bathina Ramakrishna v. State of Madras*, (1952) S.C.R. 425 (433) : A. 1952 S.C. 149.

4. *Gyan Singh v. Ram Bheja*, A. 1959 Punj. 319 (321).

5. *Bathina Ramakrishna v. State of Madras*, (1952) S.C.R. 425 (435) : A. 1952 S.C. 149.

6. *In re Times of India* (1953) S.C.R. 215.



exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adequate.<sup>7</sup>

4. An Advocate who signs an application or pleading containing matter scandalising the Court which tends to prevent or delay the course of justice is himself guilty of contempt of Court unless he reasonably satisfies himself about the *prima facie* existence of adequate grounds therefor.<sup>8</sup>

**Power cannot be abridged by legislation.**

The powers conferred upon the Supreme Court and High Court by Arts. 129 and 215, respectively, cannot be abridged by legislation.<sup>9</sup>

**130.** The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

Seat of Supreme Court.

**131.** Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

Original jurisdiction of the Supreme Court.

(a) between the Government of India and one or more States ; or

(b) between the Government of India and any State or States on one side and one or more other States on the other ; or

(c) between two or more States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends :

*Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.*

**Amendment.**—Owing to the abolition of Part B States, reference to such States has been omitted and the original Proviso has been substituted by the **Constitution (Seventh Amendment) Act, 1956.**

**Art. 131: Scope of the Original Jurisdiction of the Supreme Court.**

The Supreme Court's Original Jurisdiction is limited by the following conditions :

(a) The parties to the dispute must be as specified in clauses (a) to (c) , i.e., the constituent units of the federation. It will not entertain suits to which citizens are a party.<sup>10</sup>

7. *Shereef v. Judges*, (1955) 1 S.C.R. 757.

8. *Sodhi v. Chief Justice*, (1954) S.C.R. 454 (463).

9. Substituted for original Provisos (i) and (ii) by the Constitution (Seventh Amendment) Act, 1956.

10. *Ramgarh State v. Prov. of Bihar*, A. 1939 P.C. 55.

(b) The dispute must involve a question relating to a legal right. The expression 'legal' right is used to distinguish it from 'political' rights over which the Courts have no jurisdiction. But it is confined to rights which are enforceable by an action in a Court of law. The validity of a law of the Union or of a State is itself a question as to a legal right.<sup>11</sup>

(c) The question must not be one which is excepted by the Provisos to Art. 131 or by any other provision of the Constitution.

**'Subject to the provisions of this Constitution'.**

The jurisdiction of the Supreme Court in disputes as to the existence of a legal right between the Union and the States or between the States *inter se* is *exclusive*, except in certain matters *excepted* by other provisions of the Constitution. The following matters appear to be excluded from the original jurisdiction of the Supreme Court and vested in other tribunals, by the Constitution:

- (i) Disputes specified in the Proviso to Art. 131 and 363 (1).<sup>12</sup>
- (ii) Complaints as to interference with inter-State water supplies, referred to the statutory tribunal mentioned in Art. 262, read with s. 11 of the Inter-State Water Disputes Act [XXXIII of 1956].
- (iii) Matters referred to the Finance Commission [Art. 280].
- (iv) Adjustment of certain expenses as between the Union and the States [Art. 290].

**132.** (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

*Explanation.*—For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

**Arts. 132-136: Appellate Jurisdiction.**

These Articles deal with the appellate jurisdiction of the Supreme Court which may be classified under the following heads—

- (1) Appeals on constitutional questions: (a) By certificate of High

11. *United Prov. v. Governor-General*, A. 1939 F.C. 58.

12. *State of Seralhella v. Union of India*, (1950-51) C.C. 271: A. 1951 S.C. 253.



Court [Article 132 (1)]. (b) By special leave of Supreme Court [Article 132 (2)].

(2) Appeals involving no constitutional questions: (a) Civil [Article 133]. (b) Criminal [Art. 134].

(3) Appeal by special leave of Supreme Court in any case other than the above [Article 136].

**Art. 132: Appeals involving constitutional questions.**

1. The Article deals with appeals involving interpretation of the Constitution, arising out of any proceeding in a High Court,—civil, criminal or otherwise.<sup>13</sup>

2. It says that an appeal shall lie to the Supreme Court from any judgment, decree or final order of any High Court, in the territory of India in any civil, criminal or other proceeding—provided it involves a substantial question of law as to the interpretation of this Constitution, and—

(i) either the High Court certifies to the above effect; or

(ii) the Supreme Court itself grants special leave on the above ground, where the High Court has refused such certificate.

3. This Article thus ensures that though a High Court may pronounce upon the validity of an Act or decide any other question involving the interpretation of the Constitution, in all such cases the decision of the High Court shall not be final and that the final authority of interpreting the Constitution must rest with the Supreme Court.<sup>14</sup> Constitutional appeals are thus placed by the Constitution in a special category irrespective of the nature of the proceedings in which they arise, and a right of the widest amplitude is allowed in cases involving such questions.<sup>15</sup>

Cl. (1): 'Judgment, decree or final order'.—See under Art. 133, and the Expl. to the present Article, pp. 245-6; 250-2, *post*.

**'High Court'.**

The decision of a Single Judge is a decision of the High Court for purposes of appeal under Art. 132<sup>16</sup> though it is not so under Art. 133 (3). A Single Judge is, accordingly, competent to give a certificate under Art. 132 (1).<sup>17</sup>

'Judgment, decree or final order'.—See under Art. 133 (1), *post*.

'Civil proceeding'.—See under Art. 133, p. 252, *post*.

'Criminal proceeding'.—See under Art. 134, p. 275, *post*.

'Other proceedings'.

1. These words, which were not in s. 205 (1) of the Government of India Act, 1935, have been deliberately introduced by the framers of the Constitution to confer a right of appeal from a judgment, decree or final order in any proceeding provided a substantial question as to the interpretation of the Constitution is involved. There is no reason to apply a narrow interpretation of these words.<sup>18</sup> A right of appeal of the widest amplitude has been allowed in cases involving constitutional questions, irrespective of the nature of the proceedings in which they may arise.<sup>19</sup>

13. *Election Commission v. Venkata*, A. 1953 S.C. 210 (212) : (1953) S.C.R. 1144 (1149).

14. *State of J. & K. v. Ganga*, A. 1960 S.C. 356 (359).

15. *Sriram v. Board of Revenue*, A. 1954 Nag. 1 (F.B.).

2. The expression would thus include revenue proceedings,<sup>16</sup> e.g., under the Sales-tax Act<sup>17</sup> or Income-tax Act;<sup>18</sup> proceedings for disciplinary action against lawyers.<sup>19</sup>

**'Substantial question as to interpretation of this Constitution'.**

1. Under the present article there is no scope for appeal unless there is some substantial question of law as to the interpretation of some provision of the Constitution involved in the case. The constitutional question must arise upon the findings of either the High Court or the subordinate Court.<sup>20</sup>

2. The word 'substantial', in this context, does not mean a question of general importance but a question regarding which there is a difference of opinion.<sup>21</sup>

(a) A question which has been settled by the previous decisions of the Supreme Court is not a substantial question.<sup>22,23</sup> Thus, it has been held by the Supreme Court<sup>24</sup> that Art. 14 has been already interpreted by the Court in a number of cases and that a mere application of the article to the facts of a new case does not raise any substantial question of law as to the interpretation of the Constitution. A substantial question, according to this decision, is raised only where a new interpretation is suggested to a provision of the Constitution.<sup>25</sup>

Similar view has been taken about Art. 311.<sup>26</sup>

(b) On the other hand, the question whether a previous decision of the High Court has ceased to be good law in view of a decision of the Supreme Court which has not directly overruled it,<sup>27</sup>

3. The following may be cited as instances where a question of constitutional interpretation is involved—

(i) A suit challenging<sup>1</sup> a statute as *ultra vires*.<sup>2</sup>

(ii) A conviction under a law which is challenged as *ultra vires*.<sup>3</sup>

(iii) Cases directly involving the interpretation of some particular provision of the Constitution<sup>4</sup> unless the point has already been settled<sup>5</sup> by a previous decision.

(iv) Whether a law<sup>6</sup> or an executive order<sup>7</sup> or a custom<sup>8</sup> contravenes any fundamental right.

16. *Sriram v. Board of Revenue*, A. 1954 Nag. 1 (P.B.).

17. *Cf. Poppallal v. State of Madras*, (1952-4) 2 C.C. 537; A. 1953 S.C. 274.

18. *Allen Berry v. I. T. O.*, A. 1956 Pat. 175 (177).

19. *P., a Pleader v. Judges*, A. 1937 All. 167; *Krishnaswami v. Council of Chartered Accountants*, A. 1953 Mad. 79.

20. *Sudhir v. The King*, (1948) D.L.R. (F.C.) 4.

21. *Jang Bahadur v. Principal*, A. 1951 Pepsu, 61.

22. *Cf. Krishnaswami v. Governor-General*, A. 1947 F.C. 37.

23. *State of J. & K. v. Ganga*, A. 1960 S.C. 356 (359).

24. *State of Mysore v. Chabiani*, A. 1958 S.C. 325 (328).

25. *Cf. State of Punjab v. Shadi Lal*, A. 1960 S.C. 397 (399).

1. *Jang Bahadur v. Principal*, A. 1951 Pepsu 61.

2. *Bhairabendra v. State of Assam*, (1956) S.C.A. 736.

3. *Kishori v. King*, A. 1950 P.C. 37.

4. *Corpn. v. St. Thomas School*, (1940) F.L.J. 361.

5. *Cf. Hari Vishnu v. Ahmad*, A. 1955 S.C. 233.

6. *Krishnaswami v. Governor-General*, A. 1947 F.C. 37.

7. *Cf. Ganpatil v. State of Bihar*, A. 1955 S.C. 188; *Budhan v. State of Bihar*, A. 1955 S.C. 191 (192).

8. *Namazi v. Dy. Custodian*, (1951) 2 M.L.J. 1.

9. *Ram Bhan v. Raf Bhan*, A. 1951 V.P. 38.



4. On the other hand, the following has been held *not* to involve question of law as to the interpretation of the Constitution—

(i) A wrong interpretation of an Act even though the writ of mandamus<sup>11</sup> or habeas corpus<sup>12</sup> has been refused on such interpretation.

(ii) Whether an Act has been correctly applied to the facts of a case.<sup>13</sup>

(iii) Whether a reasonable opportunity has been given within the meaning of Art. 311 (2) is a question of fact,<sup>14</sup> but there may be cases where the question of reasonable opportunity is inextricably mixed up with the nature and content of the constitutional guarantee under that Article.<sup>15</sup>

#### Form of certificate.

There is no form prescribed for the certificate required under s. 132. It can be granted by the Court by an observation at the end of the judgment.<sup>16</sup>

#### Cl. (2): Leave of Supreme Court.

While the Supreme Court's discretion to grant special leave under Art. 136 is altogether unfettered, under Art. 132 (2), there is no scope for granting a special leave unless two conditions are satisfied—(i) the case should involve a question of law as to the interpretation of the Constitution; (ii) the said question must be a substantial question.<sup>17</sup>

#### Cl. (3): Appeal on other grounds.

1. This clause means that when an appeal comes up to the Supreme Court on the strength of a certificate under Art. 132 (1), the appellants are not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the certificate was given except with the leave of the Supreme Court itself.<sup>18</sup>

2. But the Supreme Court would give such leave to argue on 'other ground' if there has been a grave miscarriage of justice, e.g., where a Criminal Court, in convicting the accused, relied upon an admission which did not exist upon the record.<sup>19</sup>

3. Hence, if in an appeal under Art. 132, the appellant wants to urge any ground other than constitutional, he must, after obtaining the leave to appeal under either clause (1) or (2), obtain the further leave of the Supreme Court under cl. (3).<sup>20</sup> Even in the matter of constitutional ground, if the certificate is given on the question of interpretation of one Article (say, Art. 226), the appellant cannot, in the Supreme Court, raise the question of interpretation of another Article (say, Art. 311), without leave of the Supreme Court under the present clause.<sup>21</sup>

#### Explanation.

1. The Explanation governs the meaning of the expression 'final order' in cl. (1) of this Article. The commentary at p. 250, post, explains the meaning of the expression, generally with reference to the expression as it occurs in all the three Articles—132, 133 and 134, but in the

10. *Lachman v. Govt. of Bihar*, A. 1952 Pat. 385.

11. *Kishorilal v. State*, A. 1951 Assam 169.

12. *Rex v. Abdul Majid*, (1949) F.L.J. 133.

13. *State of Mysore v. Chabani*, A. 1958 S.C. 325 (328).

14. *S. V. Oil Co. v. C. T. O.*, A. 1957 Cal. 528.

15. *State of J. & K. v. Ganga*, A. 1960 S.C. 356 (359).

16. *State of Mysore v. Chabani*, A. 1958 S.C. 325 (327).

17. *Darshan Singh v. State of Punjab*, A. 1953 S.C. 83.

18. *State v. Muktar Singh*, A. 1957 All. 505 (510).

context of the present Article, the commentary is to be read subject to the Explanation.

2. The object of the *Explanation* is to override the decision in *Kuppuswami v. The King*,<sup>19</sup> so far as appeals on constitutional questions are concerned. In *Kuppuswami's case*,<sup>20</sup> it was held that an order rejecting an objection as to the validity of a prosecution for want of sanction was not a 'final order'. But it would be a final order for the purpose of an appeal, if a constitutional question was involved, for the *Explanation* says that for the purposes of Art. 132, an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case, would be a final order. If the High Court had allowed an objection that the prosecution was not maintainable, that would have resulted in the final disposal of the case, acquitting the accused-appellant. According to the *Explanation*, therefore, an order rejecting such objection is also a 'final order' for the purposes of Art. 132, though not for the purposes of appeal under Art. 134.

3. Similarly, where constitutional questions are involved, the following orders would constitute 'final orders' for purposes of appeal under Art. 132, though they may not be final orders for the purposes of Art. 133 :

(i) An order remanding a suit for hearing on the merits after deciding a preliminary issue as to non-maintainability of the suit.

(ii) In a proceeding under Art. 226 for *mandamus* against the Government, the High Court, while declining to investigate the rights of the parties, passed an order that the Government should refrain from disturbing the Petitioner's possession till three months from the date of the order or one week after the institution of the suit contemplated by the Petitioner. *Held*, by the Supreme Court, that the order finally disposed of the petition under Art. 226 and the fact that its operation was limited to a particular period would not make it other than a 'final order', for the purposes of an appeal under Art. 132 against such order.<sup>21</sup>

4. On the other hand, even though there was a decision on a constitutional issue, the following orders would not be 'final order' within the meaning of the *Explanation*, because they are not sufficient for the final disposal of the case :

Where a Magistrate made a reference to the High Court as to whether the Act under which the accused had been prosecuted was invalid, even before any evidence as to the offence was taken, and the High Court decides that the Act is not unconstitutional.<sup>22</sup>

5. The present *Explanation* cannot be applied to the interpretation of the words 'final order' in Art. 133.<sup>23</sup>

### 133. (1) An appeal shall lie to the Supreme Court from

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on

19. *Kuppuswami v. The King*, (1947) F.C.R. 180.

20. *State of Orissa v. Madan Gopal*, (1952) S.C.R. 28 (34).

21. *In re Krishna*, A. 1955 Mad. 532.

22. *Basudevanand v. Raghubir*, A. 1954 Pat. 241.



appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value ; or

(c) that the case is a fit one for appeal to the Supreme Court ;

and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

### Art. 133: Civil Appeals.

1. While Art. 132 is confined to constitutional questions only, but comprises appeals from civil, criminal and other cases Art. 133 is confined to *Civil* appeals only, on questions *other than the interpretation of the Constitution* [subject to Cl. (2)].

2. This Article lays down, that apart from appeal by special leave under Art. 136 and appeal on constitutional ground under Art. 132, appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, only on the following conditions :

(a) The subject of appeal is a 'judgment, decree or final order'.

(b) The High Court grants a certificate<sup>23</sup> for such appeal—

(i) The certificate is obtained when the value of the subject-matter in dispute is not less than Rs. 20,000 (or such sum as may be fixed by Parliament) or some claim or question of like value is involved in such judgment, etc. But in cases where the decree sought to be appealed from is one of *affirmance* of the decree of the immediate lower Court, there is no right of appeal unless the High Court further certifies that some 'substantial question of law' is also involved in the appeal.

(ii) In other cases, *irrespective of the value of the subject-matter or of the fact of affirmance*, appeal would lie to the Supreme Court if the High Court, in its discretion, certifies that the case is a fit one for appeal to the Supreme Court, e.g., by reason of its importance.<sup>24</sup>

23. *Rudra v. Mirlunjoy*, A. 1957 All. 28 (33).

24. *Udaythan v. Firm Shankar Lal*, A. 1953 M.B. 209 (F.B.).

3. The provisions of this Article cannot be overridden or modified.<sup>25</sup>

4. In an application for certificate under this Article, the Petitioner must specify the particular sub-clause of cl. (1) under which the certificate is asked for.<sup>1</sup>

#### Art. 133 is prospective.

Art. 133 applies only to decrees and orders passed by High Courts established under the Constitution.<sup>2</sup>

Suits or proceedings instituted prior to the Constitution would be governed by Art. 135, even though the decrees or orders are passed after the commencement of the Constitution.<sup>3</sup>

#### Art. 133 and ss. 109-110, C. P. Code.

1. The constitutional rights of a litigant under Art. 133 cannot be controlled by anything in ss. 109-110 of the C. P. Code. Once therefore the conditions of Art. 133 (1) are satisfied, a certificate cannot be refused on the ground that the person has no right of appeal, in the circumstances of the case, under ss. 109-110, C. P. Code.<sup>4</sup> In case of conflict between Art. 133 and ss. 109-110, the former is to prevail.<sup>5</sup> On the other hand, where there is no right of appeal under Art. 133, s. 110 of the C. P. Code cannot be read as supplementing the provisions of Art. 133.<sup>6</sup>

2. While s. 109 of the C. P. Code applies also to 'other Courts of final appellate jurisdiction', Art. 133 is confined only to decisions of the High Court.<sup>4</sup>

3. Under s. 109 (a), appeal lies only from an order 'passed on appeal' by a High Court, but under Art. 133 (1), appeal lies from any 'final order', including final orders in civil revision proceedings, and this provision of the Constitution will now prevail against the narrower provision in the C. P. Code.<sup>4</sup>

4. The words used in s. 110, para. 1 is "... value of the subject-matter of the *suit* in the Court of first instance", while the words in Art. 133 (1) (a) are "... value of the subject-matter of the *dispute* in the Court of first instance."<sup>7</sup>

5. It was held in some cases<sup>8</sup> that para. 2 of s. 110 was dependent on para. 1 so that there would be no appeal as of right unless the amount or value of the subject-matter of the suit in the Court of first instance exceeded the specified amount. But no such construction is possible under Art. 133, and sub-cl. (b) of cl. (1) cannot but be held to be independent of sub-cl. (a).<sup>4, 9</sup>

6. Under s. 109 (c), the certificate of fitness can be granted in respect of 'any decree or order'. But under Art. 133 (1) (c), the certificate can be granted only if the order is 'final' and the decree or final order is passed in a civil proceeding. Since the Constitution is to prevail, there is no longer any appeal by a certificate of the High Court from an order in a civil proceeding which is not final.<sup>4, 10</sup> The provision to the contrary in s. 109 (c) has become *ultra vires*.<sup>11</sup>

25. *Moti Das v. Sahi*, A. 1959 S.C. 942 (951).

1. *Di. Board v. Tahir*, A. 1950 All. 572 (F.B.).

2. *Daji Sahib v. Shankar Rao*, (1955) 2 S.C.R. 872.

3. *Garihapati v. Subbiah*, (1957) S.C.R. 488.

4. *Rudra v. Mirtunjoy*, A. 1957 All. 28 (32).

5. *Ramaswami v. Official Receiver*, A. 1951 Mad. 1051.

6. *Probitendra v. Berhampore Bank*, (1953) 57 C.W.N. 933 (939).

7. *Cf. Champaman v. Yunus*, A. 1951 Pat. 177.

8. *Lalmina v. Kamal*, A. 1952 Pat. 450.

9. *Prohiti v. Subhakaran*, A. 1955 Raj. 208.

10. *Pramatha v. Sanatkumar*, A. 1949 P.C. 60 (62).



Cl. (1): 'Judgment, decree or final order'.

1. This Article is not confined to suits as distinguished from proceedings.<sup>11</sup> The only condition is that the judgment etc. must be passed in a 'civil proceeding'.

2. Nor need the judgment or order be made by the High Court in its appellate jurisdiction (as s. 109 (a) of the C. P. Code requires<sup>12</sup>). Under the present Article, appeal lies to the Supreme Court from the decision of a High Court whether under its original, appellate or revisional<sup>13,14</sup> jurisdiction and even though the law may provide for only one appeal to the Supreme Court.<sup>15</sup>

3. The word 'judgment' itself indicates a judicial decision given on the merits of the dispute before the Court<sup>16</sup> and does not include an interlocutory judgment.<sup>17</sup> The omission of the word 'final' to qualify 'judgment' does not make any change.<sup>18</sup>

4. There is no 'judgment' or 'order' where the function of the Court is merely advisory or consultative,<sup>19</sup> as distinguished from proceedings under its original or appellate jurisdiction.<sup>20</sup> Thus, there is no application of Art. 133 to a decision of the High Court, on a reference under s. 66 of the Indian Income Tax Act,<sup>21,22</sup> or under s. 21 (3) of the Bihar Sales Tax Act, 1944.<sup>23</sup>

5. Nor can there be a 'judgment, decree or order' within the meaning of the present Article where the High Court exercises a jurisdiction not as a Court but as a *persona designata*, e.g., appeal from an award under s. 19 (1) (f) of the Defence of India Act, 1939.

6. 'Judgment, decree or final order' is a compendious expression and each one of the parts of this expression bears the same connotation, viz., that there is an adjudication by the Court upon the rights of the parties, who appear before it.<sup>24</sup> There is no judgment or final order where there is no determination of any right, e.g.,

- (i) An order rejecting a petition under Art. 226 to issue a direction to the Commissioner of Sales Tax to admit the Petitioner's appeal.<sup>25</sup>
- (ii) An order under s. 10 of the C. P. Code for the stay of a trial.<sup>26</sup>
- (iii) An order refusing stay of proceedings under s. 19 of the Arbitration Act.<sup>27</sup>
- (iv) An order appointing or removing a Receiver,<sup>28</sup> or a provisional liquidator.<sup>29</sup>

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- 11. *Pramatha v. Sanatkumar*, A. 1949 F.C. 60 (62).
  - 12. *Joy Chand v. Kamalaksha*, A. 1949 P.C. 239.
  - 13. *Labina v. Lakshminikanta*, (1951) 30 Pat. 1274 (1279).
  - 14. *Rudra v. Mirtunjay*, A. 1957 All. 28 (33).
  - 15. *Kuppuswami v. The King*, A. 1949 F.C. 1.
  - 16. *Amin Bros. v. Dominion of India*, A. 1950 F.C. 77.
  - 17. *Tobacco Manufacturers v. State*, A. 1951 Pat. 29 (F.B.).
  - 18. *Premchad v. State of Bihar*, (1950) S.C.R. 799 (804).
  - 19. *Pehladi v. Commr. of I. T.*, A. 1952 Punj. 299.
  - 20. *Jamnadas v. Commr. of I. T.*, (1952) 54 Bom. L.R. 609 : A. 1952 Bom. 479; *Jagannath v. I. T. Commr.*, A. 1956 Hyd. 136 (138).
  - 1. *Hanskumar v. Union of India*, A. 1958 S.C. 947.
  - 2. *Hossen Kasam v. State Govt.*, M. P., A. 1952 Nag. 305.
  - 3. *Central Brokers v. Ramnarayana*, A. 1954 Mad. 1057 (F.B.).
  - 4. *Ramchand v. Goverdhandas*, A. 1920 P.C. 86.
  - 5. *Mangaraju v. Varahalamma*, A. 1956 Andhra 47.
  - 6. *Jhabar v. Punjab Pictures*, A. 1949 E.P. 261.

**'Judgment'.**

This word, in Art. 133, has been used in the sense of a decision finally determining the rights of the parties in the proceeding, and not as defined in the C. P. Code.<sup>1-11</sup> The decision of a vital issue which may ultimately affect the fate of the proceeding is not enough.

It follows that an order which is not final cannot be deemed to be a judgment.<sup>12</sup>

**'Decree'.**

This word, in Art. 133 (1), includes both preliminary and final decrees. Hence, appeal lies to the Supreme Court from both.<sup>13,14</sup> Certain questions are finally determined by a preliminary decree.<sup>14</sup>

**'Final order'.**

1. An order is final only if it satisfies the following tests<sup>15</sup>—

(a) That it is not interlocutory;

(b) That it should not leave the original proceeding alive;

(c) That there should be a final determination of the rights of the parties or should of its own force<sup>16</sup> affect the rights of the parties.

2. It must be an order which finally determines the points in dispute and brings the case to an end.<sup>17,18</sup> The test for determining the finality must be in relation to the suit; the fact that the order decides an important or vital issue is by itself immaterial, unless the decision puts an end to the suit.<sup>19,21</sup> Hence, no certificate under s. 133 (1) is available against the following orders—

(i) An order of the High Court remanding a suit<sup>22</sup> or an execution petition for further proceeding holding that it is not barred by limitation<sup>23</sup> or *res judicata*.<sup>24</sup>

But an order remanding a suit may be a final order and appealable under Art. 133 (1), if it is made after finally determining all the material issues,<sup>25</sup> and practically directing the lower Court to draw up a decree in terms of the order of remand.<sup>1</sup>

(ii) An order deciding a preliminary issue.<sup>2</sup>

7. *Inda Devi v. Board of Revenue*, A. 1957 All. 116.

8. *Hanumanbux v. State of M. P.*, A. 1955 Nag. 257.

9. *West Jamuria Coal Co. v. Bholanath*, A. 1954 Cal. 424.

10. *Monoharlal v. Hiralal*, A. 1957 M.B. 47 (49).

11. *Chandanmull v. Mohanlal*, A. 1953 Mad. 727.

12. *Amin Bros. v. Dominion of India*, A. 1950 F.C. 77.

13. *Ganeshdas v. Murlidhar*, A. 1956 M.B. 151.

14. *Cf. Rahimkhoy v. Turner*, (1891) 15 Bom. 155 P.C.

15. *Bhagwan v. I. T. O.*, A. 1958 All. 800 (802).

16. *Premchand v. State of Bihar*, (1950) S.C.R. 799 : A. 1951 S.C. 14.

17. *Ramaswami v. Official Receiver*, A. 1951 Mad. 1051.

18. *Radhakrishnan v. Collector*, (1901) 23 All. 220.

19. *Cf. Hori Ram v. Emp.*, A. 1939 F.C. 43 (49).

20. *Abdul Rahaman v. Cassim & Sons*, A. 1933 P.C. 58.

21. *Amin Bros. v. Dominion of India*, A. 1950 F.C. 77.

22. *Habibunnissa v. Munawar*, (1903) 25 All. 629; *Amsingh v. Jethmal*, A. 1957 Raj. 173.

23. *Sindhuram v. Krishna Dutta*, A. 1951 Assam 73.

24. *Daulat Ram v. Swami Dayal*, A. 1955 All. 252; *Basudevanand v. Raghubir*, A. 1954 Pat. 241.

25. *Gurdwara Prabandhak Committee v. Shiv Rattan*, A. 1955 S.C. 576 (582).

1. *Venkayya v. Venkatarama*, A. 1956 Andhra, 126.

2. *Taher v. State of Bombay*, A. 1958 S.C. 253.



(iii) An order rejecting an application for leave to appeal in *forma pauperis*.<sup>3</sup>

(iv) An order setting aside a compromise decree and directing the trial Court to dispose of the suit on merits.<sup>4</sup>

(v) An order under s. 34 of the Arbitration Act, 1940.<sup>5</sup>

(vi) An order dismissing an application under s. 66 (3), of the Income-Tax Act to direct the Commission of I. T. to state a case.<sup>6</sup>

2. In order to be 'final', the order must, in its own force, bind or affect the rights of the parties.<sup>7</sup>

On this principle, the following are not final orders—

(i) An order of the High Court dismissing an application under s. 21 (3) of the Bihar Sales Tax Act, 1944, to direct the Board of Revenue to state a case and refer it to the High Court is not a 'final order', because the order of the High Court, standing by itself, does not affect the rights of the parties, and the final order in the matter is the order which will be ultimately passed by the Board of Revenue.<sup>8</sup>

(ii) An order dismissing an application under Art. 226 of the Constitution for issuing a direction to the Commission of Sales Tax to admit an appeal without deposit of the tax assessed as required by s. 22 (1) of the C. P. & Berar Sales Tax Act, 1947, is not a final order, because it does not determine the rights of the parties in the appeal, but merely decides the question whether the appeal can be prosecuted without depositing the tax assessed as required by the statute.<sup>9</sup>

Similar view has been taken where the High Court dismissed an application under Art. 226 against an order of an Income Tax Officer on the ground that there was an alternative and convenient remedy before the Income-tax Appellate Tribunal,<sup>10</sup> because such order of dismissal does not determine the rights of the parties but leaves them to be agitated in appropriate proceedings.<sup>11</sup>

(iii) An order refusing to restore an appeal, dismissed for default; for, the right of the parties had already been disposed of by dismissal of the appeal for default. The order complained of only refused to allow the matter to be re-agitated.<sup>12,13</sup>

(iv) An order appointing or removing a receiver; for, such order does not affect the rights of the parties at all but merely relates to the preservation of the estate during pendency of the suit.<sup>14,15</sup> For the same reason, an order made in an appeal filed against an order directing the appointment of a receiver is not a final order.<sup>16,17</sup>

(v) An order rejecting an application for excusing delay, under s. 5 of the Limitation Act.<sup>18</sup>

3. *Jagat Ram v. Gogna*, A. 1951 Panj. 30.

4. *Yasin v. Himmat*, A. 1952 Ajmer 15.

5. *Gaya Electric Supply Co. v. State of Bihar*, (1951) 30 Pat. 853 : A. 1951 Pat. 619.

6. *Jamnadas v. Commr. of I. T.*, A. 1952 Bom. 479.

7. *Premchand v. State of Bihar*, (1950) S.C.R. 799 : A. 1951 S.C. 14.

8. *H. K. Dada v. State Government*, A. 1952 Nag. 305.

9. *Bhagwan v. I. T. O.*, A. 1955 All. 800.

10. *Dhanalakshmi v. I. T. O.*, A. 1958 Mad. 151.

11. *Janaki v. Srirangammal*, A. 1953 Mad. 38.

12. *Mohamood Hassan v. Govt. of U. P.*, A. 1956 All. 457.

13. *Rayarappan v. Madhavi*, A. 1950 Mad. 215.

14. *Viswanath v. Kanakmal*, A. 1953 M.B. 204.

15. *Madangopal v. State of Orissa*, A. 1955 Orissa 71.

16. *Mangaraju v. Varahamma*, A. 1956 Andhra 47.

17. *Narasimha v. Venugopala*, A. 1956 Andhra 159.

18. *Chandanmull v. Mohantal*, A. 1953 Mad. 727; *Purnendu v. Kanai*,

(1948) 2 Cal. 202.

(vi) An order under s. 115 of the C. P. Code refusing to interfere with the decision of the lower Court as to whether the notice under s. 89 was valid.<sup>19</sup>

(vii) An order for appointment of an arbitrator.<sup>20</sup>

(viii) An order returning a memorandum of appeal for presentation to the proper Court.<sup>21</sup>

(ix) Dismissal of appeal from an order refusing an application to set aside an *ex parte* decree.<sup>22</sup>

3. On the other hand, where the order finally disposes of the matter, the fact that the operation of the order is limited to a certain period does not prevent the order from being final.<sup>23</sup>

#### Illustration.

The Government of Orissa annulled certain mining leases granted to the Petitioners. The Petitioners applied to the High Court for an order in the nature of mandamus directing the Government to withdraw the notices annulling the leases. The High Court, without expressing any opinion regarding the right of the Petitioners, granted an interim relief directing that till three months from that date or one week after institution of the suit which the Petitioners contemplated to file, the Government should refrain from disturbing the Petitioners' possession over the mining areas in question. The State appealed under Art. 135 (1) of the Constitution. *Held*, that the appeal was competent as the order of the High Court was a final order as nothing remained to be done in respect of the petitions. The fact that the operation of the order was limited to three months did not prevent the order from being final.<sup>24</sup>

4. The finality may be with respect to a proceeding subsequent to the suit. Hence, the following is a final order—

An order dismissing an appeal for default.<sup>25</sup>

#### 'Civil Proceeding'.

1. The expression is wide enough to cover any proceeding of a civil nature held by the High Court, whether in its original, appellate or revisional jurisdiction.<sup>1</sup>

2. 'Civil proceeding', however, does not include all proceedings other than criminal. Generally speaking, a proceeding is a civil proceeding only if it relates to a civil right.<sup>2</sup>

Thus, the following have been held *not* to be a 'civil proceeding' within the meaning of the present Article—

(i) Proceedings under taxing statutes such as the Income-tax Acts are not civil proceedings.<sup>3</sup>

(ii) A proceeding under s. 21 (2) of the Chartered Accountants Acts, 1949.<sup>4</sup>

(iii) Reference on a question of law under the Sales Tax Act.<sup>5</sup>

19. *State of Madras v. C. P. Agencies*, A. 1955 Nag. 287.

20. *Union of India v. Nalluwaranjan*, A. 1955 Cal. 257.

21. *Mukunda v. Bidhan*, A. 1960 Cal. 77.

(1948) 2 Cal. 202.

22. *Ramaswami v. Ramanathan*, A. 1942 Mad. 357.

23. *State of Orissa v. Madangopal*, (1952) S.C.R. 28 (34).

24. *State of Orissa v. Madangopal*, (1952) S.C.R. 28 (34).

25. *Ganesh v. Makhna*, A. 1948 All. 375.

1. *Rudra v. Mirlunjoy*, A. 1957 All. 28 (33).

2. *Ram Jiwan v. Ram Janki*, A. 1960 All. 84.

3. *Tobacco Manufacturers v. The State*, A. 1951 Pat. 26 (42) F.B.

4. *Krishnaswami v. Venkatrama*, A. 1953 Mad. 79.



3. As regards proceedings under Art. 226, a Full Bench of the Patna High Court<sup>5</sup> has laid down the general propositions that they are not civil proceedings because the jurisdiction under Art. 226 is an extraordinary jurisdiction vested in the High Court for the purpose of ensuring that the various courts and tribunals are kept within their jurisdiction and not for the purpose of declaring civil rights.

As will be apparent from the undermentioned cases, such a general proposition is not warranted by the fact that the Supreme Court has, in fact, in many cases entertained appeals from orders under Art. 226, granted under Art. 133 (1) (c). The view taken by the other High Courts seems to be correct, viz., that in order to determine whether a proceeding is a civil proceeding or not, it is necessary to know what were the *questions raised and decided in the proceeding*.<sup>6,7</sup> If the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding.<sup>8,9</sup>

On this principle, the following have been held to be or treated as 'civil' proceedings :

An application under Art. 226—

(i) For a writ to quash an order terminating the Petitioner's service.<sup>10,11</sup>

(ii) For a writ to quash a reference to an Industrial Tribunal under Industrial Disputes Act;<sup>12</sup> or to quash an order of the Regional Transport Authority in the matter of granting a State Coach permit;<sup>13</sup> or to quash an order of the State Government under s. 54A of the Motor Vehicles Act, setting aside the order of a Regional Transport Authority.<sup>14</sup>

(iii) For a writ to quash an order of the Board of Revenue in relation to a proceeding for ejectment;<sup>15</sup> or an order relating to allotment of land under the Administration of Evacuee Property Act, 1950.<sup>16</sup>

(iv) For a writ to quash proceedings under the Taxation of Income (Investigation Commission) Act, 1947.<sup>17</sup>

(v) For a writ sought on the ground that the Bombay Taluqdari Tenure Abolition Act, 1949 was unconstitutional.<sup>18</sup>

(vi) For a writ to compel Government to grant a mining lease.<sup>19</sup>

4. On the same principle, certificate under Art. 133 (1) (c) has been granted from an order under Art. 227 with respect to a decision of the Election Tribunal.<sup>20</sup>

5. In some cases it has been held that<sup>21,22</sup> a proceeding is a civil

5. *Collector of Monghyr v. Pralap Singh*, A. 1957 Pat. 103 (F.B.).

6. *Brif Lal v. State of U. P.*, A. 1958 All. 621.

7. *Ramchandra v. Shankaramma*, A. 1953 Hyd. 131.

8. *Kapur Singh v. Union of India*, A. 1957 Punj. 173 (F.B.).

9. *Jagannath v. State of Orissa*, A. 1957 Orissa 42.

10. *Ramayya v. State of Madras*, A. 1952 Mad. 300.

11. *State of U. P. v. Muktar Singh*, A. 1957 All. 505 (522).

12. *C. J. D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (267).

13. *Ramayya v. State of Madras*, A. 1952 Mad. 300.

14. *Raman & Raman v. State of Madras*, A. 1956 S.C. 463.

15. *Inda Devi v. Board of Revenue*, A. 1957 All. 116.

16. *Kehar Singh v. Custodian-General*, A. 1959 Punj. 58.

17. *Rashid & Son v. I. T. I. Commn.*, (1954) S.C.R. 738.

18. *Dhirubha v. State of Bombay*, A. 1955 S.C. 47.

19. *Brif Lal v. State of U. P.*, A. 1958 All. 621.

20. *Tirath Singh v. Bachittar Singh*, A. 1955 S.C. 830; *Budhinath v. Manilal*, A. 1960 Pat. 861 (F.B.).

21. *Allen Berry & Co. v. I. T. O.*, A. 1956 Pat. 175 (178).

22. *Kapur Singh v. Union of India*, A. 1957 Punj. 173 (181) F.B.

proceeding if a suit could have been brought to enforce the right which is sought to be enforced in the proceeding; but the converse may not be correct.<sup>23</sup>

On this principle it has been held that the following is *not* a civil proceeding—

An application under Article 226 against an order of assessment of income-tax brought without pursuing the remedies provided by the Income-tax Act,<sup>24</sup> or Sales Tax.<sup>25</sup>

6. There are some proceedings which are deemed to be 'civil proceedings' by reason of statutory provisions, e.g., appeal from order of Election Tribunal under s. 116A of the Representation of the People Act, 1950.<sup>26</sup>

7. Of course, even where a proceeding under Art. 226 may be regarded as a civil proceeding, an appeal under Art. 133 cannot lie unless the order is 'final'.<sup>27</sup>

### Sub-clause (a): Value of the subject-matter.

1. Under clause (a), the pecuniary value of the suit in the Court of first instance as well as that of the subject-matter of appeal to the Supreme Court must be Rs. 20,000 or upwards.<sup>28</sup> Both the requirements must be fulfilled separately.<sup>29</sup> Where the value of the claim in the plaint filed in the Court of first instance is less than the specified sum, the plaintiff cannot be allowed to increase that valuation at the time of applying for leave to appeal.<sup>30</sup>

2. The 'value of the subject matter' in the present context means the real or market value and need not be identical with the value given in the plaint or memorandum of appeal for purposes of court-fee or jurisdiction where the Court-fees or the Suits Valuation Act prescribes a valuation on a basis other than that of the market value.<sup>31</sup> No question of estoppel arises in such a case,<sup>32</sup> and the High Court may direct an inquiry for determining the market value in the proceeding under Art. 133.<sup>33</sup>

(a) In a suit for *specific performance*, while the amount of consideration in the contract of sale is the value for court-fees, the value for purposes of appeal is the market-value of the property contracted to be sold, at the time of institution of the suit and at the time of the decree of the High Court.<sup>34</sup>

(b) In a suit for a declaration with consequential relief (where the Court-fees Act or the Suits Valuation Act allows the plaintiff to put his own valuation), the appellant (whether plaintiff or defendant) is

23. *Allen Berry & Co. v. I. T. O.*, A. 1956 Pat. 175.

24. *Sriram v. Board of Revenue*, A. 1954 Nag. 1 (F.B.).

25. *Kishore v. Raghunath*, A. 1960 Orissa 1 (2).

1. *Bhagwan v. I. T. O.*, A. 1958 All. 800.

2. *Cf. Motichand v. Ganga*, (1902), 24 All. 174 (P.C.).

3. *Radhakishan v. Ramchandra*, A. 1954 Nag. 267.

4. *Rameshwar v. Sidheshwar*, A. 1927 Cal. 418; *Sri Krishna v. Purushotham*, A. 1939 All. 695.

5. *Mahendra v. Janaki*, A. 1931 Cal. 417.

6. *Radhika v. Midnapore Zamindary*, A. 1937 Cal. 292.

7. *Govindbhai v. Dabhyabhai*, A.I.R. 1937 Bom. 326.

8. *Zaratonna v. Falsur Rahaman*, A. 1955 Assam 126.

9. *Haramani v. Balaram*, A. 1957 Orissa 109.

10. *Annapurna Cotton Mills v. Bhaduri*, A. 1958 Cal. 187 (190).

11. *Kashi Prasad v. Bajju*, A. 1953 Pat. 24 [contra *Mugneram v. Kalidas*, (1955) 59 C.W.N. 681].



entitled to show that the market value of the property for the purposes of appeal<sup>12, 13</sup> exceeds the amount prescribed by Art. 133 and that he is entitled to appeal as of right.

3. But the principle stated in the foregoing paragraph would not apply where the plaintiff is required to be valued according to the market value.<sup>14</sup> In such a case, the principle that a party cannot both approve and reprobate applies. Thus, if the defendant does not object to the valuation made in the plaint, he cannot turn round when the plaintiff seeks to appeal from the decision in the suit, and say that the valuation should be different.<sup>15</sup>

**'Value of the subject-matter of dispute in the Court of first instance'.**

1. This expression means the value of the subject-matter at the time of institution of the suit.<sup>16</sup> Hence,

Mesne profits<sup>17</sup> and interest *subsequent* to the institution of the suit,<sup>18</sup> though awarded by the decree, or costs<sup>19</sup> cannot be added in computing the value of the suit in the Court of first instance.<sup>19</sup> For the same reason, increase in the market value of the property during pendency of the suit cannot be taken into consideration for the purpose.<sup>20</sup>

2. Ordinarily, the amount claimed in the plaint represents the value of the dispute in the Court of first instance. Thus—

#### *Illustration.*

In a suit for *patni* rent, the claim was Rs. 12,800. The defence was that the *patnidars* were entitled to an abatement of rent as a portion of the land had been lost by diluvion. *Held*, the value of the subject-matter was the amount of rent claimed by the plaintiff. It was impossible to capitalise the value of the defence and include it in the value of the dispute. As no claim was made to the future, what was to occur in the future was not and could not be in dispute.<sup>21</sup>

3. The value of the subject-matter is—

(a) In a suit on mortgage,—the mortgage money or the amount of loan, and not the value of the property given as security.<sup>21, 22</sup>

(b) In a suit for redemption,—The amount of loan, and not the security given for the loan.

(c) In a partition suit,—value of the share claimed and not that of the entire property.<sup>23</sup>

(d) In a suit for accounts,—the amount claimed, in the court of first instance; and the amount decreed by the High Court, as regards the amount in dispute on appeal to the Supreme Court.<sup>24</sup>

12. *Zaratounessa v. Falsur*, A. 1955 Assam 126.

13. *Govindbhai v. Dahyabhai*, A. 1937 Bom. 326.

14. *Prabirendra v. Berhampore Bank*, (1953) 57 C.W.N. 933 (941).

15. *Kristo v. Hurromonee*, (1874) 1 I.A. 84.

16. *Fajendra v. Rashbehari*, A. 1931 P.C. 125.

17. *Mangamma v. Mahalakshamma*, A. 1930 P.C. 44.

18. *Dy. Commr. v. Rama Krishna*, A. 1954 S.C. 521; *Shevantibai v. Janardan*, A1944 P.C. 65.

19. *Radhakishan v. Ramchandra*, A. 1954 Nag. 267.

20. *Dibakar v. Bimalchandra*, A. 1951 Cal. 409.

21. *Vishwanath v. Stremal*, A. 1955 M.B. 66.

22. *Satlalaba v. Chotanagpur Banking Assocn.*, (1948) I.L.R. 27 Pat.

237 : A. 1949 Pat. 448.

23. *Venkataswami v. Manikyam*, A. 1951 Mad. 723.

24. *Shevantibai v. Janardan*, A. 1944 P.C. 65.

25. *Tajammal v. Qalsar*, A. 1956 All. 638.

(c) In a suit for declaration that the plaintiffs are *jointly interested* in the property in suit along with the defendants, the value of the subject-matter of dispute is the plaintiffs' share in the joint property<sup>24</sup>.

4. But the 'subject-matter' of the dispute may not always be identical with the amount of claim in the suit. Thus,

In a proceeding for *selling aside an execution sale*, under O. 21, r. 90, which is in the nature of an original proceeding,—the value of the property sold and not that of the subject-matter of the suit in which the decree was passed.<sup>1</sup>

### 'Court'.

In Art. 133 (1), the 'Court of first instance' refers to a 'Civil Court'.<sup>2,3</sup> Hence, it does not include—

(i) An arbitrator.<sup>2</sup>

(ii) A Rent Controller.<sup>3</sup>

### 'Value of the subject-matter in dispute on appeal'.

This expression refers to the value of the *issue* between the parties in appeal, which may not always be identical with the value of the suit.<sup>4</sup> It does not mean the amount of the value of the subject-matter of all disputes between the parties but that of what is in stake in the appeal itself.<sup>5</sup> The material date for the valuation is the date of the judgment appealed from.<sup>6</sup>

### Illustrations.

(i) If a suit raises between two co-defendants an issue different from the issue between the plaintiff and the defendants, as between the co-defendants the value of the subject-matter or dispute will be the value of the issue in which they are interested *inter se*.<sup>4</sup>

(ii) In a suit for judgment in terms of award, it is the value of the entire property dealt with by the award and not the value of the share of any of the parties, which is to be the value for appeal under the present clause.<sup>7</sup>

(iii) The value of an appeal to the Supreme Court in a suit for accounts is the sum decreed in first appeal. Where the lower Court had decreed the suit for Rs. 19,000/- and the Court of appeal allowed the appeal by reducing the decree by Rs. 100/- and also allowing a cross-objection to the extent of Rs. 600/-, the value of the appeal to the Supreme Court would be 19,600/- minus 100/-, i.e., 19,500/-.<sup>8</sup>

(iv) In a proceeding for the execution of a decree for a heavy sum, the judgment-debtor's contention that he had paid to the decree-holder Rs. 8,000/- was rejected by the High Court. *Held*, the value for purposes of appeal by the judgment-debtor was Rs. 8,000/- only and so he was not entitled to appeal under cl. (1) (a).<sup>9</sup>

### Whether appellant entitled to consolidate appeals for raising value.

1. Where the requisite conditions for consolidation under O. 45, r. 4, C. P. Code are satisfied, an appellant is entitled to an order for

1. *Janki Prasad v. Kailash*, A. 1956 All. 735.

2. *Balasubramania v. Radhakrishnamurthi*, A. 1949 Mad. 741 : (1950) Mad. 254.

3. *Jatiya Estate v. V. B. C. & Co.*, (1956) 60 C.W.N. 927.

4. *Prabrendra v. Berhampore Bank*, A. 1954 Cal. 289 (292-3) : 57 C.W.N. 933.

5. *Mandal Ghat Zemindary v. Gour*, A. 1953 Cal. 509.

6. *Kishore v. Chorani*, A. 1960 A.P. 286 (289) F.B.

7. *Jagannath v. Hazari*, A. 1954 All. 509.

8. *Tajammal v. Qaisar*, A. 1956 All. 638.

9. *Kartar Singh v. Ramkumar*, A. 1953 Pat. 377.



consolidation of appeals for the purpose of showing that the value of the appeal is higher than what would have been the value if the appeals were considered individually.<sup>10</sup>

2. But the fact that there was a question common to a number of suits would not entitle an appellant to an order for consolidation if there were other questions which were not common.<sup>11</sup> Further, if the suits have been decided by separate judgments, there can be no consolidation under O. 45, r. 4, C. P. Code.<sup>12</sup>

3. In the case of a suit comprising several items of property in which different defendants are interested, and such defendants prefer separate appeals, the aggregate value of all the items in dispute shall be the value for purposes of appeal, because the 'subject-matter in dispute' is one.<sup>13</sup> The appeals would, however, be treated separately where each of the several appellants sued or was sued in respect of some distinct or unrelated cause of action, in which cases, the subject-matters in dispute in appeal would be more than one.<sup>14</sup>

**Clause (b): 'Question respecting property of like amount or value'.**

1. As in clause (a), it is the value which governs the right of appeal, but while in clause (a), the expression used is 'subject-matter', clause (b) uses the word 'property'.<sup>15</sup> Clause (b) would apply where the claim itself is incapable of money valuation, e.g., easement<sup>16,17</sup> but the property to which it relates has a value of Rs. 20,000 or above.

The following suit has been held to come under this head—

A suit for a declaration that the defendant was not pregnant at the time of her husband's death and that her alleged posthumous child was not the son of her husband.<sup>18</sup>

2. It would also apply where, whatever be the value of the actual subject-matter of the suit, the claim involves some question relating to property of the above value.<sup>19</sup> Value of the property refers to the value at the date of the decree or order.<sup>20</sup>

3. Unlike the second part of s. 110 of the C. P. Code, sub-cl. (b) of Art. 133 (1) of the Constitution is to be read independently of sub-clause (a) of the Art., so that sub-cl. (b) will be satisfied if the judgment of the High Court indirectly involves a question respecting property of the value of not less than Rs. 20,000/-, even if the value of the subject-matter in dispute in the Court of first instance was less than that; and also that, in view of conflict between s. 110 of the C. P. Code and Art. 133 (1) (b) of the Constitution, the latter must prevail. This means that a certificate under art. 133 can now be claimed under any one or more of the three paragraphs marked (a), (b) and (c), principally or in the alternative and it is not necessary to satisfy the requirements of para. (b) as an alternative to the restriction 'the amount or value of the subject-matter . . . twenty thousand rupees'.<sup>21,22</sup>

10. *Lakshminarasinha v. Ratnam*, A. 1949 Mad. 739 (F.B.).

11. *Balangayya v. Varadarajulu*, I.L.R. (1939) Mad. 593.

12. *Aisha v. Kundan*, A. 1946 All. 184.

13. *Peithu v. Rajambu*, A. 1948 P.C. 97.

14. *Central Talkies v. Dwarka Prasad*, A. 1956 All. 348.

15. *Lallubhai v. Bhimbhai*, A. 1929 Bom. 541.

16. *Katar Singh v. Ramkumar*, A. 1953 Pat. 377.

17. *Amarsingh v. Karnall*, A. 1956 Raj. 168.

18. *Subramania v. Sellammal*, (1916) 39 Mad. 843 (846); *Keshoprasad v. Shiva*, (1918) 44 I.C. 475 (Pat.).

19. *Surendra v. Dwarka*, (1917) 44 Cal. 110.

20. *Lalmita v. Lakshmikanta*, (1951) 30 Pat. 1274 (1281).

21. *Cf. Champamani v. Yunus*, A. 1951 Pat. 177.

22. *Naranji v. Jivram*, A. 1952 Kutch 29.

**'Involves directly or indirectly'.**

It is not easy to give a clear-cut answer to the question whether any claim or question to property is directly or indirectly involved in a suit, though it is obvious that the connection between the decree or order and the property must not be too remote.<sup>23</sup>

(A) In the following cases, it has been held that such a question was involved—

(i) A decree for mandatory injunction for demolition of property of the specified value, though the suit itself was valued at a nominal sum.<sup>24</sup>

(ii) A decree involving construction of a deed of gift or validity of award respecting property of the specified value, though the value of the subject-matter of the suit in which the decree was a lesser sum.<sup>25</sup>

(iii) A petition for amendment of a decree under s. 152, C. P. Code is not a continuation of the suit but is an independent proceeding.<sup>1</sup> The present clause would be satisfied, for the purposes of appeal from an order passed on such petition if the value of the decree which is sought to be amended exceeds the specified amount.<sup>2</sup>

(B) In the following cases, on the other hand, it has been held that no such claim or question was involved—

(i) A decree refusing to set aside an award of lower value, though had the award been set aside, plaintiff could have proceeded with a suit for damages for breach of contract valued at above the specified sum.<sup>3</sup>

(ii) A decree refusing a right of irrigation of agricultural lands, where the injury resulting from such refusal is less than the specified value, even though the value of the property itself may exceed that sum.<sup>4</sup>

(iii) An order as to the lunacy of a person under Sec. 63 of the Lunacy Act even though the property of the person concerned was worth more than the specified sum.<sup>5</sup>

(iv) A suit for declaration as to status, e.g., trusteeship<sup>6</sup> or adoption.<sup>7</sup>

(v) In a suit for partition, it is the value of the share claimed by the plaintiff, and not the value of the entire joint property, that determines the right of appeal under sub-clause (a) as well as (b).<sup>8,9</sup>

(vi) In a suit for redemption, the mere fact that if the loan is not repaid by the time fixed by the decree, the mortgaged property will be sold, does not raise any question 'affecting the security'.<sup>10</sup>

(vii) A claim for reinstatement in service is not a claim respecting property even though there might be a claim for compensation exceeding 20,000/- if the claim for re-instatement was decided in favour of the appellants.<sup>11</sup> An appeal from an order refusing to quash an order of dismissal cannot be brought under this clause also on the ground

23. *Udoychand v. Guzdar*, A. 1925 P.C. 159.

24. *Amar v. Shastri*, (1904) 31 Cal. 305 (P.C.).

25. *Sri Kishan v. Kashmira*, (1913) 25 All. 445.

1. *Ganpal Rai v. Aggarwal Chamber of Commerce*, (1953) S.C.R. 730 (756).

2. *Rudra v. Mirlunjay*, A. 1957 All. 28 (35).

3. *Udoychand v. Guzdar*, (1925) 52 I.A. 207.

4. *Appala v. Rangappa*, A. 1918 Mad. 832.

5. *Rukmani v. Ramkishan*, A. 1950 All. 242.

6. *Lakshman v. Rupkunwar*, A. 1956 Ajmer 15.

7. *Shevanthibai v. Janardhan*, A. 1944 P.C. 65.

8. *Venkataswami v. Mantkyam*, A. 1951 Mad. 723.

9. *Gobindbhai v. Dayabhai*, A. 1937 Bom. 326.

10. *State of Bihar v. Ganguly*, A. 1958 Pat. 26.



that even though Government might reinstate him, it did not follow that he would be entitled to recover his pay and allowances.<sup>11</sup>

### 'Property'.

There is a conflict of views as to whether the word 'property' in cl. (b) relates to property other than that which is the subject-matter of the suit or it also includes the property in dispute in the suit.

(A) The Andhra,<sup>10a</sup> Bombay,<sup>10b</sup> and Nagpur<sup>11</sup> High Courts are of the view that 'property' in this clause refers to some claim or decision respecting property additional to or other than the actual subject-matter in dispute. Thus,

In a suit for ejection from land by removal of buildings standing thereon, appeal lies under sub-cl. (b) if the value of the buildings exceeds the specified amount,<sup>12</sup> even though the value of the lands forming the tenancy be less.<sup>14</sup>

(B) The Allahabad<sup>13</sup>, Orissa<sup>16</sup>, and Patna<sup>17</sup> High Courts have taken the view that while in cl. (a) it is the 'value of the subject-matter' which is the criterion, cl. (b) relates to a case where the value of the claim is different from the property to which it relates. In such cases, it is the value of the property which governs the right to appeal. Thus,

(i) A suit for a declaration that a certain property was not liable to be attached and sold in execution of a certificate was valued at the amount for which the certificate had been issued. *Held*, that the value for purposes of appeal would be governed by the value of the property which was going to be attached and sold in execution of the certificate.<sup>18</sup>

(ii) In a suit to enforce a charge with an option to sell the charged property, the value for purposes of appeal is the value of the property which is liable to be sold in execution of the decree, though the amount of the charge may be less than that.<sup>15</sup>

(C) The Madras<sup>19</sup> High Court has held that the value of the property in suit can be taken into account under cl. (b) only where the claim is incapable of valuation, e.g., in the case of easement.

### Sub-cl. (c): Certificate as to fitness.

1. While the certificate under sub-cl. (a) and (b) of Art. 133 (1) may be obtained as of right, if the conditions specified therein are satisfied, the certificate under cl. (c) lies solely at the discretion of the High Court. The question of 'fitness' under cl. (c) has no connection with the question of a substantial question of law being involved. This jurisdiction is very wide and it is neither possible nor desirable to crystallise the rules relating to the High Court's discretion in the matter.<sup>20</sup>

2. When a certificate under this sub-cl. is granted to one party under Art. 133, it is usual,<sup>21,22</sup> to grant a certificate also to the opposite party under the present clause, though the opposite party is not

10a. *Gobindbhai v. Dayabhai*, A. 1957 Bom. 326.

10b. *Kishore v. Chorani*, A. 1960 A.P. 288 (290) F.B.

11. *Ghouse v. State of A.P.*, A. 1960 A.P. 194 (195).

12. *Seth v. Lachman*, A. 1929 Nag. 75.

13. *Maneklal v. Hormusji*, A. 1945 Bom. 113.

14. *Central Talkies v. Dwarka Prasad*, A. 1956 All. 348.

15. *Nadir Husain v. Municipal Bd.*, A. 1937 All. 169; *Md. Asghar v. Abida*, A. 1933 All. 177.

16. *Haramant v. Balaram*, A. 1957 Orissa 109.

17. *Iswari Prasad v. Kameshwar*, A. 1941 Pat. 288.

18. *Subramania v. Sellamal*, (1916) 39 Mad. 843.

19. *Cf. Jagannath v. United Provinces*, A. 1944 (F.C.) 23 (24).

21. *Subbayamma v. Venkayya*, A. 1954 Mad. 876.

22. *Gwallor Sugar Co. v. State*, A. 1955 M.B. 210.

entitled as of right to appeal under cl. (a) or (b) of Art. 133 (1).<sup>22a</sup> But it cannot be laid down as a general proposition.<sup>23</sup>

3. The pecuniary value of the subject-matter is no consideration for the certificate under the present clause. This clause is intended to meet special cases, where the point in dispute *cannot be measured in money*, but is still one of great *public or private importance*.<sup>24</sup> Thus, the fact that the decision in the case would affect the interests of a large number of people and the controversy must arise again, makes the case a fit one for appeal to the Supreme Court.<sup>25a</sup> A question which does not affect a large number of persons cannot be said to be one of great public importance.<sup>4</sup>

4. Even the existence of a divergence of opinion amongst the High Courts is not, by itself, a sufficient ground for a certificate under sub-cl. (c), where the question involved is not one of general public or private importance.<sup>4a</sup> But if the decision of the question is likely to affect numerous cases, that may be a reason for holding that the question is a matter of great public importance.<sup>4</sup>

5. A question of public importance may be one of fact.<sup>7</sup>

6. The following are instances where certificates of fitness have been granted on the ground of 'public importance' of the question involved :

(i) Dispute regarding religious rites and ceremonies;<sup>8</sup> caste and family rights.<sup>9</sup>

(ii) A matter relating to some ceremony of wide public importance.<sup>9</sup>

(iii) The right of a community to take out a religious procession along the highway.<sup>10</sup>

(iv) Such matters as the reduction of the capital of companies.<sup>9</sup>

(v) The true nature of an order or decree based on an agreement between parties and whether contempt of Court is committed by violation of such consent order or decree,—there being difference of judicial opinion on the point.<sup>11</sup>

(vi) Order of disciplinary action against a legal practitioner.<sup>12</sup>

(vii) Dismissal of an application under Art. 226 challenging an order under the Minimum Wages Act, involving interpretation of that Act;<sup>13</sup> or raising the question of validity of an Act.<sup>14</sup>

(viii) Whether the omission by a candidate himself to keep accounts as required by s. 77 constitutes a 'corrupt practice'.<sup>15</sup>

7. Though sub-cl. (c) primarily concerns cases where the claim or dispute cannot be valued in money, it does not follow that this sub-cl.

22a. *Subbayamma v. Venkayya*, A. 1954 Mad. 876.

23. *Eramma v. Veerpanna*, A. 1957 Hyd. 24 (26).

24. *Benarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

25. Cf. *Jagannath v. United Provinces*, A. 1944 (P.C.) 23 (24).

1. *Abdur Rahaman v. Raghubir*, A. 1951 Punj. 313.

2. *Kailash v. Union of India*, A. 1959 All. 685 (686).

3. *Batala Engineering Co. v. Custodian*, A. 1951 Punj. 412.

4. *Gulab v. Manphool*, A. 1953 Raj 42 (P.B.).

5. *Barada v. Surendra*, A. 1953 Assam 21.

6. *Lachman v. Bihar Govt.*, A. 1952 Pat. 386.

7. *R. S. N. Co. v. S. S. Tea Co.*, A. 1956 Assam 1.

8. *Benarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

9. *Radhakrishna v. Swaminath*, (1921) 44 Mad. 293 (P.C.).

10. *Manzur v. Zaman*, A. 1925 P.C. 36.

11. *B. B. Light Ry. v. Dt. Bd. Paina*, A. 1952 Pat. 23 (25).

12. *A Pleader v. High Court of Allahabad*, A. 1937 All. 167.

13. *Allison v. B. L. Sen*, A. 1957 S.C. 227 (229); (1957) S.C.R. 359.

14. *Inda Devi v. Board of Revenue*, A. 1957 All. 116.

15. *Keshav v. Ghayur*, A. 1959 All. 607 (611).



cannot be applied to cases where the subject-matter may be so valued but the value falls below that specified in sub-cl. (a)-(b). The High Court has a discretion in the matter of granting the certificate in such cases as in other cases,<sup>16,17</sup> having regard to the general importance of the question involved. Thus,—

(i) A certificate has thus been granted in respect of decrees in suits relating to immovable property (of a value lower than the specified amount)—

(a) Where the decision involved the nature of the rights of holders of *darmila* or post-settlement *inams* of portions of a village under the Madras Estates (Abolition of Conversion into Ryotwari) Act, 1948;<sup>18</sup> or the customary rights of succession of daughters in the Punjab.<sup>19</sup>

(b) Where the decision involved a question as to the rule of succession to the Mohuntship of certain religious endowments.<sup>21</sup>

(ii) Similarly, a certificate has been granted from orders in execution proceedings—

Where a question of interpretation of O. 21, r. 16, C. P. Code<sup>22</sup> was involved.

8. But where a small amount is involved it is to be considered whether the further appeal would be oppressively expensive to the opposite party.<sup>23</sup> But this consideration has lost much of its importance since the shifting of the venue of appeal from London to New Delhi.<sup>23a</sup>

9. The question to be determined under sub-cl. (c) is not the propriety of the order against which the leave is sought, but the importance of the question raised.<sup>24</sup> Thus—

Though the certificate may be granted against an order of suspension of an Advocate from practice under the Legal Practitioners Act,<sup>25</sup> it would not be granted where the leave is sought by the lawyer, in whose favour the order had been made, merely for the purpose of getting certain remarks expunged from the judgment.<sup>26</sup>

10. The following have been held *not* to be fit cases for certificate under this clause :

(i) The question whether a deed constitutes a mortgage by conditional sale or an out and out sale is not one of general public importance, since the question has to be determined upon the facts and circumstances of each particular case.<sup>1</sup>

(ii) Whether the pleading amounted to an admission or not.<sup>2</sup>

(iii) Where the question involved is purely one of fact, e.g., whether the Petitioner was given reasonable opportunity to show cause at the stages in a proceeding for disciplinary action, as required by Art. 331 (2).<sup>3</sup>

16. *Udoychand v. Gazdar*, (1925) 52 I.A. 207; *Shankari v. Milkha*, A. 1947 Lah. 307 (F.B.).

17. *R. S. N. Co. v. S. S. Tea Co.*, A. 1956 Assam 1.

18. *Phoolchand v. Bodriprasad*, A. 1953 Raj. 51 (F.B.).

19. *State of Madras v. Ayyangar*, A. 1956 S.C. 94.

20. *Salig Ram v. Maya Devi*, A. 1955 S.C. 266.

21. *Pirthinath v. Birkhanath*, A. 1956 S.C. 192.

22. *Jugalkishore v. Raw Cotton Co.*, A. 1955 S.C. 376 (381).

23. *Shankari v. Milkha*, A. 1947 Lah. 307 (F.B.).

23a. *Harkishan v. Mohan*, A. 1960 Punj. 192.

24. *Kutoor v. Kutoor*, A. 1950 Mad. 215.

25. *A Pleader v. High Court of Allahabad*, A. 1937 All. 167.

1. *Borada v. Surendra*, A. 1953 Assam 21.

2. *Dibakar v. Bimal*, A. 1951 Cal. 409.

3. *Ramgopal v. Gopikrishna*, A. 1957 M.P. 226 [see also *State of Mysore v. Chabiani*, A. 1958 S.C. 325 (328)].

11. 'Private importance' means importance to both parties to the litigation and not merely to one of them.<sup>4,5</sup>

The following are instances of certificate having been granted on the ground of private importance, to appeal against—

(a) A decree in a suit for declaration of title of the plaintiffs (superior landlords of Nadaun Jagir) to some trees standing on the land of the defendants (inferior landlords) because it affected the rights of the superior and inferior landlords in Nadaun Jagir.<sup>6</sup>

(b) A decree in a similar suit which involved the question whether the disputed lands had lost their *watan* character.<sup>7</sup>

(c) A decree in a suit for assessment of rent which raised the question whether the presumption of lost grant could be applied in the circumstances of the case.<sup>8</sup>

(d) A decree setting aside an award being without jurisdiction on the ground that the contract in dispute was void owing to contravention of s. 6 of the Bombay Securities Contract Act, 1925.<sup>9</sup>

12. The initial words 'judgment, decree or final order' also govern sub-cl. (c). Hence, it cannot be said that leave can be granted under sub-cl. (c), even though the order is not a 'final' one.<sup>10</sup> Under Art. 136, however, the Supreme Court itself may grant special leave to appeal even where the order is not final.<sup>11</sup>

#### Certificate not conclusive as to right to appeal.

1. When a certificate has been granted by the High Court under Article 133, the Supreme Court would not be precluded from entertaining a preliminary objection that appeal does not lie under that Article. In other words, it is open to the Supreme Court to see whether the case fulfils the requirements of the Article, and to refuse to entertain the appeal if it does not lie under the Article in spite of the certificate,<sup>12</sup> e.g., if it finds that (i) the order appealed from is not a judgment, decree or final order,<sup>13</sup> or (ii) the suit out of which the appeal arises has abated.<sup>14</sup>

2. Of course, under Art. 136 (see *post*), the Supreme Court may entertain an appeal by special leave even when the certificate granted by the High Court is defective, but exceptional grounds must exist for the granting of such special leave.<sup>15</sup>

3. On the other hand, it is open to an appellant to support a certificate on grounds other than those on which it has actually been given and the Supreme Court would entertain the appeal if the appellant succeeds in establishing such alternative grounds.<sup>16</sup>

4. A certificate will not in any manner interfere with the discretion of the Supreme Court to decide what matters can be raised in the appeal.<sup>17</sup>

4. *Muthvala v. Appajiah*, I.L.R. (1951) Mys. 423.

5. *I. T. & G. Ins. Co. v. Raj Mal*, A. 1956 Punj. 228.

6. *Cf. Rajinder v. Sukht*, A. 1957 S.C. 287 (288).

7. *Bachharam v. Vishwanath*, A. 1957 S.C. 34.

8. *Manohar v. Chaturchandra*, A. 1955 S.C. 228.

9. *Jugal Kishore v. Hommusli*, (1956) S.C.A. 499.

10. *Ramaswami v. Official Receiver*, A. 1951 Mad. 1051.

11. *Venkataramana v. State of Mysore*, A. 1958 S.C. 253.

12. *Moolji v. Khandesh Spinning Mills*, A. 1950 F.C. 83; *Amin Bros v. Dominion of Indla*, A. 1950 F.C. 77.

13. *Dy. Commr. Hardol v. Ramakrishna*, (1954) S.C.R. 506 (509).

14. *Fateh Kunwar v. Durbijal*, A. 1952 All. 942.



**Separate application required for leave to appeal.**

1. A separate application is required for a certificate for appeal. The prayer cannot be made in the alternative in an application for review of judgment.<sup>15</sup>

2. The Allahabad<sup>16</sup> High Court has ruled that an application under Art. 133, for leave to appeal will fail unless it specifies the particular sub-clause of cl. (1) the certificate is asked for.

**Whether application to appeal in forma pauperis maintainable.**

The Allahabad High Court has held that an application under O. 44, r. 1, C. P. Code is not maintainable in an application filed under Art. 133 of the Constitution, inasmuch as a Court hearing an application under Art. 133 cannot be said to be an Appellate Court.<sup>17</sup>

**Limitation.**

Limitation for an application under Art. 133 (1) (c) is 90 days from the date of the decree appealed from, under Art. 179 of the Limitation Act.<sup>18</sup>

**Form of certificate**—See under Art. 134 (1) (c), *post*.

**Judgment or Decree of Affirmance.**

1. Under Cls. (a) and (b), if the decree of the High Court is one of affirmance, there is no appeal to the Supreme Court unless the High Court also certifies that the appeal involves a substantial question of law.

2. A decision is said to be 'affirmed' within the meaning of this clause when simply the *decree* (i.e., the *result* of the suit of the Court below) is affirmed; it is not necessary that the *reasons* or *grounds* of decision of the findings must all be affirmed.<sup>19,20</sup> In other words, the *manner* in which the affirmance is made or the person at whose instance it is brought about is immaterial in the present context.<sup>21</sup> Thus, where the decree of the High Court is in favour of several other persons besides the original plaintiffs of the suit, the decree cannot be said to be one of affirmance.<sup>22</sup>

3. A judgment is affirmed when the decree is neither reversed nor modified.<sup>23</sup>

4. But if the decree is *varied*, though only as to amount, it is not an affirmance thereof,<sup>24</sup> whether such variation takes place on appeal or on cross-objection.<sup>25</sup> Thus, if a plaintiff's money claim is decreed in part by the trial Court and the appellate Court decreed it as to a larger part but still not fully, the appellate Court's decree is not one of affirmance, even though the appellate Court's decree was still in the plaintiff's favour.

15. *Baisnath v. Jangi Lal*, A. 1952 V.P. 1.

16. *Di. Board v. Tahir*, A. 1959 All. 572 (F.B.).

17. *Ovi Prakash v. State of U. P.*, (1953) 8 D.L.R. 48 (All.).

18. *Azamabad Tea Co. v. Suraj*, A. 1958 Cal. 307.

19. *Tassadug v. Kashiram*, (1903) 30 I.A. 35 : 25 All. 109 (P.C.).

20. *Kanak Sunder v. Ram Lakhan*, A. 1956 Pat. 325.

21. *Mahadev v. Secretary of State*, (1932) 54 All. 300.

22. *Kashi Bai v. Brojendra*, A. 1953 Pat. 380.

23. *Union of India v. Kanahaya*, A. 1957 Punj. 117 (119).

24. *Annappurnabai v. Ruprao*, (1924) 51 I.A. 319 : A. 1925 P.C. 60.

25. *Abdur Samad v. Ayasha*, A. 1948 Oudh 76 (F.B.).

5. Costs are treated as extraneous to the subject-matter of the suit and a variation in the matter of costs does not make the decree of the appellate Court a decree of variance.<sup>1</sup>

6. There has been a wide divergence of opinion in the different High Courts as to what would happen if the decision of the lower Court is partly affirmed and partly reversed by the High Court. The different views may be stated as follows:

1. If there has been a variation of a portion of the decree, but the variation is in favour of the appellant,—

(a) One view<sup>2, 3</sup> is that the appellant is entitled as of right (*i.e.*, even though there is no substantial question of law involved), to appeal to the Supreme Court against the other portion of the decree on which the decree of the lower Court has been affirmed by the High Court.<sup>3, 4</sup>

#### *Illustration.*

X brought a suit against Y for the recovery of Rs. 2 lacs and obtained a decree for 1½ lacs. On appeal by Y, the High Court reduced the decree to Rs. 1 lac. *Held*, this was not a decree of affirmance and Y was entitled, as of right, to the Supreme Court, even though the modification by the High Court had been in his favour.<sup>5</sup>

This view rests on the following grounds :

(i) "The decision of the court immediately below" means the decision taken as a whole.<sup>3, 6</sup> Hence, the judgment of the High Court would be a judgment of affirmance only if it confirms and ratifies the decision as a whole and not if it ratifies the decision on certain points and modifies it on others.<sup>6</sup> Where there is such modification in respect of a part, the judgment is *not* one of affirmance, whether the appellant is plaintiff or defendant or whether the effect of the modification is in favour of the appellant or to his detriment,<sup>4, 7</sup> or whether the defendant is or is not a counter-claimant,<sup>8</sup> or whether the variation is due to allowing cross-objection,<sup>9</sup> or whether the decision is affirmed substantially or on any ground other than costs.<sup>5</sup>

(ii) The Article does not contemplate an appeal against an item or items of a decree. The appeal is against the decree as a whole, though the appellant may only criticise those points which were decided adversely to him<sup>1</sup> and for the purposes of valuation, those points are taken to be the subject-matter of appeal.<sup>2</sup>

(b) The other view is that in such a case, there is no appeal as of right, *i.e.*, unless some substantial question of law is involved, against the affirmed portion.<sup>3, 12</sup>

1. *Dy. Commr., Hardoi v. Ramkrishna*, A. 1953 S.C. 521.
2. *Purnendu v. Radhakanta*, (1950) 54 C.W.N. 538.
3. *Brajasunder v. Rajendra*, A. 1941 Pat. 269 (S.B.).
4. *Union of India v. Kanhaya*, A. 1957 Punj. 117.
5. *Kushi Bai v. Brajendra*, A. 1953 Pat. 380.
6. *Ab Zamin v. Akbar*, A. 1928 Pat. 609.
7. *Nathu Lal v. Raghubir*, A. 1932 All. 65 (S.B.).
8. *Jowad v. Gendan*, A. 1926 P.C. 93.
9. *Caleh Kunwar v. Durbijal*, A. 1952 All. 943 (F.B.).
10. *Govind v. Vishnu*, A. 1949 Bom. 164.
11. *Subha Rao v. Chailamayya*, A. 1952 Mad. 771 (F.B.).
12. *Probodh v. Harahari*, (1954) 58 C.W.N. 726 (729).
13. *Ramchandra v. Ganpati*, A. 1953 Nag. 249.



*Illustration.*

In a suit for partition of joint family properties claiming a share therein as an adopted son and for possession of that share, the trial Court, while holding that all the properties in suit were joint family properties dismissed the suit on the ground that the adoption, though true, was invalid. On appeal to the High Court that Court set aside the decree of the trial Court and held that the adoption was true and valid; it further held that out of properties mentioned in the suit only certain items of lands were joint family properties and the plaintiff's claim was allowed in respect of these items, the claim in respect of the other items being rejected. *Held*, that the variation in the decision of the Court below was in favour of the applicant, and the decree was to be regarded as one of affirmance, and hence it was necessary for the applicant to show that the appeal involved a substantial question of law.<sup>14</sup>

This view rests on the reasoning that—

(i) When a decree of the lower Court is affirmed in part by the High Court and reversed or modified in part, it is the subject-matter of appeal to the Supreme Court in regard to which it is to be ascertained whether the High Court has affirmed or varied the decision of the lower court.<sup>15</sup> In other words, no appeal will lie with regard to those points upon which the High Court has affirmed the decree of the Court below.<sup>14, 16</sup>

(ii) According to this view, 'decision' means the decision of the suit in so far as it is the subject-matter of the proposed appeal.<sup>17, 18</sup> The words 'judgment, decree or final order *appealed from*' have also been interpreted to refer to that part of the judgment, etc. against which the appeal is intended to be taken.<sup>19, 20</sup>

A Full Bench of the Allahabad High Court followed this view in laying down the following principles which are to be followed where a judgment, decree or order has been *partially* varied by the High Court—

(a) If the proposed appeal to the Supreme Court is in respect of the matter upon which there is a variation, whether the variation is in favour of the appellant or against him, he has a right of appeal; provided, of course, that the valuation of the subject-matter of the proposed appeal is not less than Rs. 20,000.<sup>19, 20</sup>

(b) If the proposed appeal consists of matters about *some* of which there is an affirmance and about the rest there is variation, there is a right of appeal, provided, of course, that the valuation of the entire subject-matter of the proposed appeal is not less than Rs. 20,000.

(c) If the proposed appeal is in respect of only that matter upon which the High Court has affirmed the decree of the trial Court, there is no right of appeal unless there is a substantial question of law involved.<sup>14, 20</sup>

(d) The principles stated in (a), (b) and (c) above will apply to a composite decree where there was both an appeal and a cross-objection in the High Court, for only one decree is prepared in such cases.

14. *Govind v. Bishnu*, A. 1949 Bom. 164.

15. *Subba Rao v. Chelamayya*, A. 1952 Mad. 771 (F.B.).

16. *Bardoloi v. Collector of Kamrup*, A. 1952 Assam 134.

17. *Girdharilal v. Fatehchand*, A. 1956 M.B. 145 (147).

18. *Eramma v. Veerpanna*, A. 1957 Hyd. 24.

19. *Fateh Kanwar v. Durbisai*, A. 1952 All. 942 (F.B.).

20. *Subbarayudu v. State of Andhra*, A. 1959 Andhra 87 (F.B.).

(e) But if there were two appeals in the High Court from one decree of the lower Court, then the decree of the High Court in each of the appeals will be separately considered and if the proposed appeal to the Supreme Court arising out of one of such decree relates to a matter on which that decree has affirmed the decision of the Court below, there will be no right of appeal without a substantial question of law being involved.<sup>21</sup>

#### Illustration.

A, a Hindu widow, sued B, the next reversioner of the last holder, for a declaration that she was entitled to the estate. The trial Court held that B, and not A, was the owner, but granted a maintenance allowance to A at a certain rate. B appealed to the High Court against the grant of maintenance while A filed cross-objection in respect of the rest of the decree. The High Court affirmed the decree in respect of B's title and disallowed the maintenance allowance granted to A, thus allowing B's appeal and dismissing A's cross-objection. A applied for leave to appeal to the Supreme Court but no mention was made about the maintenance allowance in the grounds, which were subsequently sought to be amended by inclusion of that ground. Held, that if the proposed appeal related merely to the question of title to the property, there was no right to appeal, even though the valuation of the subject-matter is not less than Rs. 20,000, because there was no substantial question of law involved. But if the proposed appeal either with or without amendment related to both the title to the property and the question of maintenance allowance, there was a right of appeal even though there was no substantial question of law involved.<sup>22</sup>

(f) If, however, the variation in the appellant's favour falls short of his total claim as regards the particular matter, the judgment is not one of the affirmance, and the second paragraph of Art. 133 (1) would not be attracted.<sup>23</sup>

II. If the decree of the lower Court has been varied in part to the *prejudice* of the appellant,—

(a) One view<sup>24,25</sup> is that the appellant is entitled as of right, to appeal to the Supreme Court, both on the varied and the affirmed portions.<sup>24,25</sup>

(b) The other view is that in such a case, the appellant is entitled to appeal as of right only in respect of the varied portion, but not in respect of the affirmed portion.<sup>1</sup>

#### 'Affirms'.

1. The expression 'affirms the decision of the Court below' implies that the High Court has dealt *judicially* with the decision of the Court below and upheld it.<sup>2</sup>

2. Thus, the following are not an affirmance of the decision of the Court below, within the meaning of Art. 133 (1) :

An order rejecting the admission of an appeal, holding that the High Court has no *jurisdiction* to entertain the appeal,<sup>3</sup> or that it is barred by limitation.<sup>3</sup>

21. *Fateh Kunwar v. Durbijai*, A. 1952 All. 942 (F.B.).

22. *Probodh v. Harahari*, (1954) 58 C.W.N. 726 (729).

23. *Gangadhara v. Subramania*, A. 1946 Mad. 539 (F.B.).

24. *Abdur Samad v. Aisha*, A. 1948 Oudh 76 (F.B.).

25. *Jaggoo v. Harihar*, A. 1941 All. 66 (F.B.).

1. *Abdul Majid v. Dattoo*, A. 1946 Nag. 307.

2. *Gulabchand v. Kudilal*, A. 1952 M.B. 149.

3. *Purnendu v. Kanai*, (1948) 2 Cal. 202.



3. On the other hand, it has been held that there is a decree of affirmance—

(a) Where the appeal is dismissed for failure to furnish security for costs.<sup>4</sup>

(b) An order dismissing an appeal for default.<sup>5</sup>

**Whether the variation must be on a substantial question.**

(A) According to one view,<sup>6</sup> if the decree of the Court below is varied on any ground other than costs, there is a decree of variance and not of affirmance, e.g.,

Where the High Court has disallowed<sup>7</sup> or reduced<sup>8</sup> the claim for interest or varied the quantum<sup>9</sup> of damages<sup>9</sup> or substituted a mortgage decree by a money decree,<sup>10</sup> or passed the decree in favour of several persons other than the original plaintiffs of the suit.<sup>11</sup>

(B) On the other hand, it has been held<sup>12,13</sup> that there is a decree of variance only where there is a variation in the substantive relief in respect of the whole or part of a party's claim. Thus, there is no variance where the decree of the Court below is affirmed with—

(a) Variation in the period of grace for the payment of the mortgage amount.<sup>14</sup>

(b) Incidental or consequential variation of the decree, in order to clarify what was implicit in the judgment of the Court below, e.g., insertion of a clause fixing the time within which the structures were to be removed by the defendant, as directed by the judgment,<sup>15</sup> removing clerical error in the decree,<sup>16</sup> to bring it in accordance with the judgment.<sup>14</sup>

(c) Variation of the manner of working out the details in accordance with the terms of a preliminary decree for partition without making any change in the rights of the parties as declared by that decree.<sup>17</sup>

### 'Decision'.

Decision in this context means the decision of the suit and not the judgment or the reasons given therefor.<sup>18</sup>

### 'Court immediately below'.

1. According to the Nagpur,<sup>19</sup> Punjab<sup>20</sup> and Madras<sup>21</sup> High Courts, a Single Judge is a 'Court immediately below' a Division Bench, on the Appellate Side. The contrary view has been taken by the Allahabad<sup>22</sup>

4. *Mahadeo v. Secy. of State*, A. 1932 All. 312.

5. *Ganesh v. Makhna*, A. 1948 All. 375.

6. *Nathu Lal v. Raghbir*, A. 1932 All. 65 (S.B.).

7. *Hilendra v. Sukhdeb*, A. 1929 Pat. 561.

8. *Jaggoo v. Harihar*, A. 1941 All. 66 (F.B.).

9. *Viraraghava v. Narasimha*, A. 1950 Mad. 124.

10. *Homeshear v. Kameshwar*, A. 1933 Pat. 262.

11. *Kashi Bai v. Brajendra*, A. 1953 Pat. 380.

12. *Mool Chand v. Brijmani*, A. 1955 All. 680.

13. *Tabarak v. Dalip Narain*, A. 1927 Pat. 379.

14. *Bastram v. Ram Ratan*, A. 1927 P.C. 117.

15. *Gokhul v. Nooran*, A. 1957 Pat. 7.

16. *Prabirendra v. Berhampore Bank*, (1953) 57 C.W.N. 933 (944).

17. *Girdharilal v. Fatehchand*, A. 1956 M.B. 145 (150).

18. *Kanak Sunder v. Ram Laxhan*, A. 1957 Pat. 325 (328).

19. *Kishanlal v. Vilhal*, A. 1956 Nag. 276.

20. *Cf. Gurkirat v. Gurdil*, A. 1960 Punj. 32.

21. *Sathappa v. Umayal*, A. 1959 Mad. 391.

22. *Deokinandan v. State of U. P.*, A. 1959 All. 10.

High Court, following a decision of the Calcutta High Court<sup>23</sup> under the corresponding provision in s. 110 of the C. P. Code. According to this latter view, 'Court immediately below' means a Court other than the High Court. The former view, it is submitted, appears to be correct. According to the former view,<sup>24</sup> where a Single Judge varies the decree or order of a lower Court but a Division Bench affirms the decision of the Single Judge, the final judgment in the case, for the purposes of Art. 133 (1) is that of the Division Bench and not that of the Single Judge and it is a judgment of affirmance.

2. But a Division Bench is not a 'Court immediately below' a Special Bench.<sup>25</sup>

### What is a question of law.

1. 'Law' in this context means the general law and not merely statute law.<sup>26</sup> A question of law is to be distinguished from a question of 'fact'. But question of law and of fact are sometime difficult to disentangle,<sup>27</sup> and we may properly appreciate what is a question of law for the present purpose, only with reference to illustrations.

2. Thus, the following questions have been held to be questions of law :

(a) the proper legal effect of a proved fact;<sup>28</sup> e.g., the applicability of s. 18 of the Limitation Act upon proved or admitted facts;<sup>29</sup> or whether a property is secular or debottar;<sup>30</sup> or whether the defendant had accepted a mortgage deed, to which he was not a party, as a binding obligation upon himself;<sup>31</sup> or whether the tenancy was permanent;<sup>32</sup> whether there had been a dedication to the public or a presumption of lost grant could be raised.<sup>33</sup>

But not factual inferences from other facts.<sup>34</sup>

(b) Whether any evidence has been offered on the one side or the other.<sup>35</sup>

(c) Misdirection on a point of law in dealing with the evidence,<sup>36</sup> e.g., as to onus of proof.<sup>37</sup>

(d) The nature of the plaintiff's title.<sup>38</sup>

(e) The construction of a document.<sup>39</sup>

(f) The legal inference from a document,<sup>40</sup> e.g., whether from an entry in a Wajib-ul-arz an inference of a sovereign right by the Government can be drawn.<sup>41</sup>

(g) The admissibility of any piece of evidence,<sup>42</sup> provided it is such as to materially affect the finding.<sup>43</sup>

23. *Debendra v. Bibudhendra*, A. 1916 Cal. 973.

24. *Gulabchand v. Kudilal*, A. 1952 M.B. 149.

25. *Ramgopal v. Shamskhalon*, (1893) 19 I.A. 528.

1. *Nafar v. Shukur*, (1918) 45 I.A. 183.

2. *Deshmukh v. Kothari*, (1951) 6 D.L.R. (S.C.) 73 (77).

3. *Midnapur Zemindary v. Umacharan*, A. 1923 P.C. 187.

4. *Dhanna Mal v. Motisagar*, (1927) 54 I.A. 178.

5. *Lakshmidhar v. Rangalal*, (1949) 76 I.A. 271.

6. *Meenakshi Mills v. Commr. of I. T.*, A. 1957 S.C. 40 (58).

7. *Har Kishan v. Salgur*, (1955), 7 D.L.R. 97 (All.).

8. *Jogesh v. Emdad*, A. 1932 P.C. 28.

9. *Secretary of State v. Krishna*, A. 1945 P.C. 165.

10. *Fateh Chand v. Kishan*, (1912) 39 I.A. 247.

11. *Choudhuri v. Kishore*, (1919) 46 I.A. 197.

12. *Rafendra v. Sukhl*, A. 1957 S.C. 287 (293).

13. *Nafar v. Shukur*, (1918) 45 I.A. 183.

14. *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (107) (P.C.)



(h) Whether there is or is not evidence to support a finding.<sup>15</sup>

(i) A question of law arises where a Court arrives at a decision on a question of fact by considering material which is, wholly or in part, irrelevant to the inquiry or bases its decision partly on conjectures, surmises or suspicion.<sup>16</sup>

(j) Whether a document was validly presented for registration.<sup>17</sup>

(k) The interpretation of statutory provisions and the scope and effect thereof even though in coming to the conclusion certain preliminary facts must be found.<sup>18</sup>

#### Instances of questions of fact.

The following have been held to be questions of fact and *not of law* :

(i) Whether a fact has been proved when evidence for and against has been properly received.<sup>19</sup>

(ii) Whether a statutory presumption has been rebutted.<sup>20</sup>

(iii) The effect to be given to a document is a question of fact, where there is no question as to the construction thereof.<sup>21</sup> Here, a distinction has been made as between documents of title and other documentary evidence. If the deed is the very foundation of the suit, a mistake as to its meaning has been held to involve a question of law,<sup>22</sup> but not so if it is a mere piece of evidence,<sup>23</sup> even though such document may be a historical document.<sup>24</sup>

It follows that a mistaken inference from a document is a finding of fact, if there is no misconstruction of the document.<sup>25</sup>

(iv) Whether an endowment is private or public,<sup>26</sup> there being no question of misconstruction of a document involved.<sup>27</sup>

(v) Whether the properties in dispute are joint family properties or whether there has been a partition thereof.<sup>28</sup>

(vi) Whether there was a sufficient nucleus of joint family property, for acquiring new properties by the manager of a joint Hindu family.<sup>29</sup>

(vii) A controversy relating to ordinary items in the taking of accounts between a principal and an agent.<sup>30</sup> But questions of *principle* relating to accounts would be entertained as questions of law.<sup>31</sup>

(viii) A finding as to whether a transaction was *benami*,<sup>32</sup> a finding whether a deity was a family deity or dedicated to the public and whether properties given to the deity constituted a religious endowment of a public nature.<sup>33</sup>

(ix) Whether consideration mentioned in a deed was actually paid.<sup>34</sup>

15. *Harendra v. Haridasi*, (1914) 41 I.A. 110.

16. *Dhiraflal v. Commr. of I. T.*, A. 1955 S.C. 271 (273).

17. *Jamba v. Nawab*, 37 All. 49 P.C.

18. *Associated Cement Co. v. Workmen*, A. 1960 S.C. 56 (62).

19. *Wali Mohammad v. Mohammad*, A. 1930 P.C. 91.

20. *Shahebrao v. Jaiwantrao*, (1933) 60 I.A. 231.

21. *Amiruddi v. Makhani*, A. 1930 P.C. 83.

22. *Midnapur Zemindari v. Umacharan*, A. 1923 P.C. 187; *Secy. of State v. Rameswaram*, (1934) 61 I.A. 163.

23. *Narayan v. Gopal*, A. 1960 S.C. 100.

24. *Ramchandra v. Ganpati*, A. 1953 Nag. 249.

25. *Girimallappa v. Yellappagouda*, A. 1959 S.C. 906 (907).

1. *Kampur v. Muralidhar*, A. 1944 P.C. 87.

2. *Raghunatha v. Nagappa*, A. 1949 P.C. 25.

3. *Meenakshi Mills v. Commr. of I. T.*, (1956) S.C.A. 1139 (1165).

4. *Misrilal v. Surji*, A. 1950 P.C. 28.

5. *Narayan v. Gopal*, A. 1960 S.C. 100.

6. *Girimallappa v. Yellappagouda*, A. 1959 S.C. 906 (907).

(x) Whether, in a particular case, a reasonable opportunity of showing cause within the meaning of Art. 311 (2) has been given is, ordinarily, a question of fact.<sup>7</sup> But cases are conceivable where the question of fact would be inextricably mixed up with the nature and content of the constitutional guarantee.<sup>8</sup>

#### Instances of mixed questions of fact and law.

There are certain questions where the issue raises a question of law to be determined from certain facts being proved. These are mixed questions of fact and law. In such cases, the Supreme Court may interfere with the conclusion arrived at by the Court or tribunal below but not the finding of fact on which the conclusion is based.<sup>9</sup> Instances of such questions are—

(a) Whether a custom has been established.

The existence or prevalence of a custom is a question of fact (i.e., the finding as to the things that are actually done in pursuance of the alleged custom); but the finding whether the facts proved satisfy the requirements of law in order to establish a valid custom, is a question of law.<sup>10</sup> In other words, it is a question of law whether a custom is to be recognised or not; but the facts upon which the question is to be decided cannot be a matter of appeal beyond the first appellate Court.<sup>11</sup>

(b) Whether, in an industrial employment, the payment of 'Puja bonus' every year may be inferred as an implied term of the employment.<sup>12</sup>

(c) Whether a transaction is an adventure in the nature of a 'trade',<sup>12,13</sup> within the meaning of s. 2 (4) of the Income-Tax Act, 1922.

#### A 'substantial question of law'.

1. It is not a mere question of law but a substantial question of law that is required for the purpose of the certificate in case of a decree of affirmance. In order to be 'substantial' it must be such that there may be some doubt or difference of opinion,<sup>14</sup> or there is room for difference of opinion.<sup>15,16</sup> Thus, if the law is well-settled by a final Court of Appeal or by an overwhelming consensus of judicial opinion, the mere application of it to a particular set of facts does not constitute a substantial question of law.<sup>17</sup>

2. The word 'substantial' does not, however, imply that the question of law must be of interest to the public in general or to any person other than the parties to the litigation.<sup>18</sup> It means a substantial question of law as between the parties to the litigation.<sup>19</sup>

3. A question of law is substantial if the decision turns one way or the other on the particular view taken of the law, e.g., whether a

7. *State of Mysore v. Chabani*, A. 1958 S.C. 325 (328).

8. *Meenakshi Mills v. Commr. of I. T.*, (1956) S.C.R. 691 (720) : A. 1957 S.C. 49.

9. *Palanisappa v. Devasthanam*, (1917) 44 I.A. 147.

10. *Lakshmidhar v. Rangalal*, A. 1950 P.C. 56 (59).

11. *Ispahani v. Ispahani Employees' Union*, A. 1959 S.C. 1147.

12. *Venkataswami v. Commr. of I. T.*, A. 1959 S.C. 359 (364).

13. *Sarof v. Commr. of I. T.*, A. 1959 S.C. 1252 (1256).

14. *Gulabchand v. Kudilal*, A. 1952 M.B. 149.

15. *Subba Rao v. Veeraju*, A. 1951 Mad. 969.

16. *State of Madras v. C. P. Agencies*, A. 1955 Nag. 287.

17. *State of J. & K. v. Ganga Singh*, A. 1960 S.C. 356.

18. *Raghunath v. Deputy Commissioner*, A. 1927 P.C. 101.



judgment would operate as *res judicata* in a case,—though the decision may be unimportant to others.<sup>12,13</sup>

4. Where there is divergence of opinion amongst the High Courts, the fact that the rulings of the High Court from which appeal to Supreme Court is sought, are uniform or that there is no direct decision of that High Court, does not prevent the question from being a substantial question of law, within the meaning of Art. 133.<sup>24-25</sup> On the other hand, if there is no divergence of opinion amongst the High Courts on a point of law, the mere fact that there is no decision of the local High Court on the point would not make it a 'substantial question of law'.<sup>22</sup>

5. Nor can it be argued that there is no substantial question of law since the decision is 'obviously right'.<sup>23</sup> A question which comes before the courts frequently, may be said to be 'substantial'.<sup>24</sup>

6. On the other hand,—where the question involved is one of principle and the High Court has decided it for the first time, it is not a sufficient reason for refusing the certificate that the High Court is satisfied that their decision is correct.<sup>21</sup>

7. And for the same reason, if the question does not arise on the findings of either Court, no certificate on the present ground can be granted<sup>3</sup> merely because the question raised affects a large number of people.<sup>2</sup>

8. The following have been held *not* to involve 'substantial' questions of law—

(i) The question of construction of a decree.<sup>2</sup>

(ii) Dismissal of appeal for failure to furnish costs.<sup>4</sup>

(iii) The construction of a document would not ordinarily involve a substantial question of law<sup>2</sup> but it has been held to involve such a question where the scope for difference of opinion is serious and relates to the legal effect of the document.<sup>5</sup>

(iv) Incorrect application of the principles of law,<sup>6</sup> where the principles are well-settled.

(v) The propriety of the appointment of a Receiver.<sup>1</sup>

9. On the other hand, the following have been held to involve substantial questions of law—

(i) Whether a testamentary disposition by a Hindu in favour of a female heir conferred on her only a limited estate in the absence of evidence that he intended to confer on her an absolute interest in the property.<sup>2</sup>

(ii) The interpretation of a statutory rule imposing a tax liability.<sup>4</sup>

19. *Dinkar v. Ratansey*, A. 1949 Nag. 300.

20. *Subba Rao v. Veeraj*, A. 1951 Mad. 969.

21. *Konji & Co. v. Jalashankar*, A. 1950 Pat. 526.

22. *S. N. Chakerbarty v. Bijawal*, A. 1955 Ajmer 16; *Nallathambi v. Raghunath*, A. 1943 Mad. 581.

23. *Raghunath v. Deputy Commissioner*, A. 1927 P.C. 101.

24. *Chhail Behari v. Municipal Board*, A. 1948 All. 189.

25. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66.

1. *Sudhir v. The King*, (1948) 3 D.L.R. (F.C.) 4.

2. *Hulas Narain v. Deen Mohammad*, A. 1944 P.C. 24.

3. *Kalkashru v. C. P. Syndicate*, A. 1949 Bom. 134.

4. *Muhammad v. Secy. of State*, (1914) 36 All. 325.

5. *Jhandu v. Wahiduddin*, 38 All. 570 P.C.

6. *Sastry v. Palankar*, A. 1955 Mys. 35.

7. *Madan Gopal v. State of Orissa*, A. 1955 Orissa 71.

8. *Nathoo Lal v. Durga Prasad*, (1955) 1 S.C.R. 51.

9. *Thangavelu Chettiar v. Govt. of Madras*, A. 1953 Mad. 230.

(iii) Whether a particular income is an 'agricultural income', for the purposes of income-tax.<sup>10</sup>

10. On the other hand,—where the question involved is one of principle and the High Court has decided it for the first time, it is not a sufficient reason for refusing the certificate that the High Court is satisfied that their decision is correct.<sup>11</sup>

#### Cl. (2): Constitutional ground.

Though the right to appeal under Art. 133 (1) is not founded on the existence of any question of constitutional interpretation, nevertheless, once the appeal has been entertained by the Supreme Court, the appellant would be at liberty to attack the judgment also on the ground that some constitutional question has been wrongly decided.

#### Questions not allowed to be raised for the first time in the Supreme Court.

1. The Supreme Court being a Court of final resort, questions which require investigation are not allowed to be raised for the first time before it, e.g., questions of fact which are required to be proved by evidence.<sup>12</sup>

2. Nor will the Supreme Court allow the appellant to change his case.<sup>13</sup>

#### Scope of appeal under Art. 133.

1. In the exercise of this jurisdiction, the Supreme Court would not interfere with findings of fact, unless it is shown to be wholly unsupported by evidence,<sup>14</sup> or it is based partly on a mis-reading of the evidence and partly on the non-advertence to important material evidence bearing on the question and the probabilities of the case.<sup>15</sup>

2. The reluctance of the Supreme Court to interfere with a finding of fact arrived at by a Tribunal increases when it comes before the Supreme Court through a proceeding under Art. 226<sup>16</sup> or 227.<sup>17</sup>

3. The Supreme Court would not, ordinarily,<sup>18,17</sup> interfere with the concurrent findings of fact of the two Courts below, the reason being that when facts have been fairly tried by two Courts and the same conclusion has been reached by both, it is not in the public interest that the fact should be again examined by the ultimate Court of Appeal.<sup>19</sup>

4. But a concurrent finding of fact may be interfered with—

(a) Where there has been a substantial failure of justice, e.g., where the finding is not supported by any evidence on the record.<sup>20,21</sup>

(b) Where though the finding is one of fact, it has turned upon questions of law, such as the admissibility of material evidence or construction of documents.<sup>22</sup>

10. *Mustafa v. Commr. of I. T.*, (1946) I.T.R. 265.

11. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66.

12. *Jagannath v. Harihar*, A. 1958 S.C. 239; [1958] S.C.R. 1067.

13. *Narayan v. Gopal*, A. 1960 S.C. 100.

14. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (269).

15. *Catholics v. Paulo Azra*, A. 1959 S.C. 31 (49).

16. *Narayan v. Gopal*, A. 1960 S.C. 100.

17. *Bhinka v. Charan Singh*, A. 1959 S.C. 960 (964).

18. *Trojan & Co. v. Nagappa*, A. 1953 S.C. 298.

19. *Harindra v. Haridasi*, (1914) 41 Cal. 972 (988) P.C.

20. *Venkateswara v. Shekari*, (1881) 3 Mad. 384 P.C.; *Tilakdhari v. Kesko*, A. 1925 P.C. 122.



(c) Where the question involved is one of mixed fact and law, e.g., the construction of a lease and the inference drawn from the fact that the permanent nature of the tenancy had remained unquestioned for a very long period.<sup>21</sup>

5. But the practice of non-interference in a case of concurrent findings of fact "is not a cast-iron rule and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice".<sup>22</sup>

Thus, if there has been a *miscarriage of justice* or the violation of some principles of law of procedure, the Board might interfere with concurrent findings of fact.<sup>23</sup>

'Miscarriage of justice' in this context means—

(a) Such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word 'judicial procedure' at all; or (b) that the finding of one of the Courts is so based on an erroneous proposition of law, that if that proposition be corrected, the finding of fact disappears. In short, the rule would not apply if, underlying the findings of fact there are questions of law, on which the findings proceeded and on which the Courts misdirected themselves.<sup>24</sup>

On the other hand, miscarriage of justice does not include—

(a) Objections as to weight of evidence;<sup>25</sup> or the appreciation of any piece of evidence,<sup>1</sup> having no question as to admissibility of evidence.<sup>2</sup>

(b) Again, concurrent findings of fact would not be disturbed on the ground that inadmissible evidence as received, if the findings cannot on any reasonable view be based or dependent upon the inadmissible evidence.<sup>3</sup> (c) Nor does it detract from the weight of concurrent findings of fact that the Courts have come to the same conclusion upon different considerations.<sup>4</sup>

6. In case of *divergent* findings on a question of fact, on the other hand, the Court of second or final appeal would ordinarily attach great weight to the finding of the Judge of first instance who sees and hears the witness and is in a position to assess their credibility from his own observation.<sup>5</sup> It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunals he may go wrong on questions of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal Court should not lightly interfere with that judgment.<sup>6</sup> If, however, the finding of the Court of first instance is not based on the impression made by the witness in the witness-box, but on inferences and assumptions founded on a variety of facts and circumstances, the right of the Appellate Court to review that inferential process cannot be denied.<sup>7</sup>

7. In case of divergent views on the evidence, the Supreme Court may allow the appellant to place the entire evidence in support of his contentions.<sup>7</sup>

21. *Iswar Gopal v. Pratapmal*, A. 1951 S.C. 214.

22. *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (147) (P.C.); *Srinivas v. Mahabir*, (1951) S.C.J. 261.

23. *Rani v. Khagendra*, (1904) 31 Cal. 871 (P.C.).

24. *Tilakdhari v. Keshoprasad*, A. 1925 P.C. 122.

25. *Thakur Harihar v. Thakur Uman*, (1886) 14 I.A. 7.

1. *Robins v. National Trust Co.*, (1927) A.C. 515.

2. *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (P.C.).

3. *Keolapatti v. Amarkrishna*, (1939) 44 C.W.N. 66 (P.C.).

4. *Nūman v. Kirti*, (1893) 20 Cal. 847 P.C.

5. *Bank of India v. Chinoy*, A. 1950 P.C. 90 (94).

6. *Madholal v. Official Assignee*, A. 1950 F.C. 21 (30).

7. *Asiatic S. N. Co. v. Arabinda*, A. 1959 S.C. 597 (601).

**134.** (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may<sup>8</sup> by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

**Art. 134: Criminal Appeals.**—Apart from appeal by special leave under Art. 136, appeal will lie under the present Article to the Supreme Court from any judgment, final order or sentence in any criminal proceedings of a High Court, in the following three cases—

(i) If the High Court, on appeal, reverses the decision of acquittal of the accused person and sentences him to death. This will be a case of second appeal.

(ii) If the High Court has withdrawn for trial (s. 526 of the Criminal Procedure Code) to itself any case from a subordinate Court and, after trial, sentences him to death.

(iii) Besides the above cases of sentence of death by the High Court, the High Court shall have the power, subject to rules to be framed by the Supreme Court, to certify any criminal case as fit for appeal to the Supreme Court.

#### **Art. 134 and s. 476B of the Cr. P. C.**

In view of Art. 372 of the Constitution, the right of appeal, if any, under s. 476B of the Criminal Procedure Code must yield to the restricted right of appeal under Art. 134.<sup>9</sup>

#### **Art. 134 and s. 417, Cr. P. C.**

1. Art. 134 does not provide for an appeal from a judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. In other words, there is no provision in the Constitution corresponding to s. 417 of the Criminal Pro-

8. In its application to the State of Jammu and Kashmir, in article 134, clause (2), after the words "Parliament may", the words "on the request of the Legislature of the State" shall be inserted.

9. *Sheriff v. Govindan*, A. 1951 Mad. 1060.



cedure code. Such an order, therefore, is final, subject to the over-riding powers vested in the Supreme Court by Art. 136.<sup>10</sup>

2. In the later case of *State of Punjab v. Shadi Lal*,<sup>11</sup> the Supreme Court has explained the preceding statement by observing that what was meant in the previous case<sup>12</sup> was that in an appeal by special leave by the State against a judgment of acquittal the State could not claim *as of right* to be heard on questions of fact. The observation was made in connection with sub-cl. (a) and not sub-cl. (c) of art. 134 (1) and it was not meant that a certificate under art. 134 (1) (c) could not be granted by the High Court where it affirmed an order of acquittal and yet was of opinion that a substantial question of law was involved, particularly where the law declared by the Supreme Court was in conflict with the decision of the High Court on the very question.<sup>13</sup>

3. In an appeal under Art. 136, the Supreme Court would not interfere with an order of acquittal merely for correcting errors of fact or law.<sup>14</sup>

### 'Judgment'.

It means any decision which terminates a criminal proceeding pending before the High Court, and excludes an interlocutory order.<sup>15</sup>

### 'Final order'.

This expression has the same meaning in Arts. 133-4.<sup>16</sup> (See p. 250, ante).

In a criminal proceeding, the following are *not* final orders—  
An order on a bail petition.<sup>17</sup>

### Criminal proceeding.

1. A criminal proceeding includes all proceedings which are capable of being instituted under the ordinary criminal law of the land,<sup>18</sup> as distinguished from military law.<sup>19</sup> But it is not confined to proceedings under the Cr. P. C.<sup>20</sup> It is a proceeding which, if carried to its conclusion may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine.<sup>21</sup>

2. The Nagpur High Court has held<sup>22</sup> that a proceeding for contempt of Court is not an ordinary criminal proceeding, but a proceeding which is '*sui generis*' and of an anomalous nature and that, accordingly, no certificate can be granted under Art. 134 (1) (c) from an order by the High Court in such a proceeding.

But the better view<sup>23</sup> is that a proceeding for 'criminal contempt', i.e., for punishment of a person for contempt of court is a criminal proceeding<sup>24</sup> and the Supreme Court has entertained an appeal from a conviction for contempt, on a certificate under Art. 134 (1) (c).<sup>25</sup>

Of course, a proceeding for 'civil contempt' is a civil proceeding.<sup>26, 27</sup>

10. *State of M. P. v. Ramakrishna*, A. 1954 S.C. 20.

11. *State of Punjab v. Shadi Lal*, A. 1960 S.C. 397 (399).

12. *State of Madras v. Gurusiah*, A. 1956 S.C. 158 (161).

13. *Cf. Hori Ram v. Emp.*, A. 1939 F.C. 43.

14. *Ramaswami v. Official Receiver*, A. 1951 Mad. 1051.

15. *Nizam, in re*, (1959) 2 M.L.J. 541.

16. *Meads v. K. E.*, (1944) 49 C.W.N. (F.R.) 23.

17. *S. K. Gupta v. Sen*, A. 1950 Cal. 106 (109).

18. *D. J. Airways v. Union of India*, A. 1956 Punj. 1 (3).

19. *Zikar v. State*, A. 1952 Nag. 130.

20. *Cf. Brajchandani v. Jyoti Narain*, A. 1956 S.C. 66 (67).

21. *B. B. Light Ry. v. Dt. Board*, A. 1952 Pat. 23 (25).

**No appeal from reversal of order of conviction**

Subject to the overriding power of the Supreme Court, under Art. 136, there is no provision in the Constitution for an appeal where a High Court has, on appeal, reversed an order of conviction and acquitted the accused.<sup>22</sup>

**Cl. (1) (c) : Conditions for exercise of power under Art. 134(1) (c).**

1. The conditions pre-requisite for the exercise of the discretionary power to grant a certificate under arts. 133 (1) (c) and 134 (1) (c) are similar. The certificate must show on the face of it that the discretion conferred was invoked and exercised.<sup>23</sup>

2. The reasons for the order must be apparent on the face of the order itself so that the Supreme Court may be in a position to know that the High Court has applied its mind to the matter and also to know exactly what the High Court's difficulty is and what questions of law of outstanding difficulty or importance the High Court feels the Supreme Court ought to settle.<sup>24, 25</sup>

3. If the case as decided by the High Court does not involve any such question, the High Court cannot, as a matter of course, certify that the case is fit for appeal to the Supreme Court.<sup>1</sup> If a case does not involve any such question of law, then however difficult the question of fact<sup>22</sup> may be, that would not justify the grant of a certificate, because if the High Court had any doubt about the facts, the benefit of doubt must go to the accused.<sup>24, 2</sup>

**(A) When the certificate of fitness should not be granted.**

1. A certificate under Art. 134 (1) (c) cannot be granted under such circumstances as would convert the Supreme Court into an ordinary Court of appeal.<sup>24</sup>

Thus,

(a) A certificate under this clause should never be granted where the only question involved was one of *fact*, however strong the feelings of the High Court may be that the findings of fact require a reconsideration.<sup>4, 3</sup>

(b) If there is any doubt in the minds of the Judges about the facts, their duty is to acquit. They cannot convict and then issue a certificate because they cannot make up their minds about the facts.<sup>4, 4</sup>

(c) The Judicial Commissioner of Himachal Pradesh granted a certificate under Art. 134 (1) (c) on the ground that since in the High Courts, the confirmation of a sentence of death is generally made by a Bench of two Judges at least, it was fit and proper that the matter should not rest with his own decision, sitting *singly*. The Supreme Court held that the certificate should not have been granted on this ground, and observed—"If in any particular State there is only one Judicial Commissioner as the appellate authority, and if the confirmation of sentence of death has to be made by him, the procedure laid

22. *State Govt., M. P. v. Ramkrishna*, A. 1954 S.C. 20.

23. *Nar Singh v. State of U. P.*, (1955) 1 S.C.R. 238.

24. *Baladin v. State of U. P.*, A. 1956 S.C. 181; *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411 (413).

25. *Sidheswar v. State of W. B.*, A. 1958 S.C. 143 (145).

1. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66.

2. *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411.

3. *Kalawati v. State of H. P.* (1952-54) 2 C.C. 286 (287).

4. *Haripada v. State of W. B.*, (1956) S.C.R. 639.

5. *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411.

6. *Baladin v. State of U. P.*, A. 1956 S.C. 181.



down must be followed. The fact that there is not a Bench of two Judges as in the High Courts to deal with death sentences is not an adequate ground for converting the Supreme Court into an ordinary court of appeal and confirmation in such matters".<sup>7</sup>

(d) Hence, a certificate *cannot* be granted in the following cases—

(i) Where merely the construction of a particular statute is involved.<sup>8</sup>

(ii) Where the *main* ground relates to a question of fact.<sup>9</sup>

(iii) Where the question is merely one of sufficiency or credibility of witnesses or reliability of the evidence, specially when there are concurrent findings of fact;<sup>10</sup> or where there has been an error in procedure in the admission of improper evidence without which the same conclusion might properly have been arrived at.<sup>11</sup>

(iv) Where the High Court decided that in proceedings under s. 145, Cr. P. C., the preliminary order should be passed immediately on receipt of the application and that if there is any delay on the part of the Magistrate in making such an order, such delay on the part of the Court should not affect the rights of third parties.<sup>12</sup>

(v) Where there has been a mere irregularity in the procedure which may be cured under s. 537, Cr. P. C.<sup>13</sup>

(vi) Where the only point at issue is the propriety of the grant or refusal of adjournment.<sup>14</sup>

(vii) Where a Magistrate took cognizance of a case on a police report of a likelihood of a breach of the peace.<sup>15</sup>

(viii) Where a judgment of acquittal has been confirmed by the High Court.<sup>16</sup>

2. The grant of a certificate under Art. 134 (1) (c) is not a matter of course but the power has to be exercised after considering what difficult questions of law or principle were involved in the case which should require the further consideration of the Supreme Court.<sup>17</sup> Therefore, ordinarily, in a case which does not involve a substantial question of law or principle in the *affirming* judgment, the High Court would not be justified in granting a certificate under this Clause.<sup>18</sup>

### (B) Where the certificate may be granted.

1. The certificate should be granted only where there has been an infringement of the essential principles of justice<sup>19</sup> or there is a matter of great public or private importance; in short, the certificate would not be granted unless there are *exceptional and special circumstances*. The reason is that Art. 134 intends that except in cases coming under cls. (a)-(b), the High Courts in the respective States should ordinarily be the final courts of appeal in criminal matters.<sup>20</sup>

7. *Kalawatt v. State of H. P.*, (1952-4) 2 C.C. 286.

8. *Emp. v. W. H. King*, (1950) 52 Bom. L.R. 534.

9. *Khushai v. State of Bombay*, A. 1958 S.C. 22.

10. *Parshottam v. State*, A. 1952 Kutch 54; *Habib v. Hyderabad State*, A. 1951 Hyd. 71; *Kali Prasad v. State*, (1951) A.L.J. 473.

11. *Jai Singh v. State*, (1952) A.L.J. 566; A. 1952 All. 991.

12. *Narayana v. Kesappa*, A. 1951 Mad. 721.

13. *Cf. Magga v. State of Rajasthan*, A. 1953 S.C. 174 (177).

14. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 67.

15. *Raghubans v. Laxman*, A. 1951 Pat. 437.

16. *State of Orissa v. Minaketan*, A. 1953 Orissa 160 (S.B.).

17. *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411.

18. *Kali Prasad v. State*, A. 1952 All. 630.

19. *Ramakantha v. State*, A. 1957 Orissa 10 (11); *D. J. Airways v. Union of India*, A. 1956 Panj. 1 (3).

Thus, the following questions of law, *inter alia*, have been held to be fit for a certificate under Art. 134 (1) (c), in view of their importance—

(i) Whether an Appellate Court at the time of hearing an appeal under s. 411A, Cr. P. C., is entitled to go into the validity or otherwise of the order granting leave to appeal by the trial Judge.<sup>20</sup>

(ii) The point that the Magistrate decided under s. 145, Cr. P. C. the question of possession with reference to title, if such question was not raised before the High Court in revision.<sup>21</sup>

(iii) Examination of the accused in disregard of the provisions of s. 342 of the Cr. P. Code, to the utter prejudice of his defence.<sup>22</sup>

(iv) Whether the High Court has a power to review or alter its judgment in a criminal appeal, after the judgment has been recorded and a writ in terms thereof has been issued.<sup>23</sup>

(v) Interpretation of the word 'officer' in the Prevention of Corruption Act.<sup>24</sup>

(vi) Whether a person accused of an offence committed in a district which thereafter became Pakistan, could be tried of that offence in India after his migration to this country.<sup>25</sup>

2. The following has been held to involve a question of great private importance:

Suspension of Advocates from practice or like disciplinary action against them, because there are cases of great private importance concerning the future career of the Advocate.<sup>1</sup>

3. In the absence of a matter of outstanding importance or of grave injustice, the mere existence of substantial questions of law is not sufficient to warrant a certificate under Art. 134 (1) (c).<sup>2,3</sup>

The question may assume such general importance if, owing to a conflict of judicial opinion, it requires an authoritative decision from the highest Court in the land,<sup>4,5</sup> e.g.,

(a) What were the ingredients of an offence under s. 396, I.P.C.\*

(b) The proper connotation of the word 'officer' in the Indian Penal Code.<sup>26</sup>

(c) Whether a conviction was void on the ground of the Magistrate being disqualified under s. 556, Cr. P. C.<sup>7</sup>

4. On the other hand, in the absence of a substantial question of law or principle involved in an affirming judgment, the High Court would not be justified in granting a certificate, for, if the High Court had no doubt about the guilt of the accused and confirmed the order of conviction, there was nothing for a further appeal to the Supreme Court.<sup>8</sup>

5. In exercise of the power under Art. 134 (1) (c), the High Court has to consider the 'case' of each of the accused individually, and

20. *In re Sakli Velu*, A. 1951 Mad. 212.

21. *Jagdhari v. Ambika*, A. 1951 Pat. 305.

22. *Arjun v. Indian Union*, 16 Cut. L.T. 115; *Ranjha v. State*, A. 1952 H.P. 5.

23. *State of Bombay v. Geoffrey*, A. 1951 Bom. 49.

24. *Montero v. State of Ajmer*, A. 1957 S.C. 13.

25. *Central Bank of India v. Ramnarain*, A. 1955 S.C. 36.

1. *Kail Prasad v. State*, A. 1952 All. 630 (632).

2. *Public Prosecutor v. Gopalan*, A. 1953 Mad. 66 (69).

3. *D. J. Airways v. Union of India*, A. 1956 Punj. 1 (4).

4. *Ramakantha v. State*, A. 1957 Orissa 10 (12).

5. *Rama v. State*, A. 1956 M.B. 20.

6. *Shyam Behari v. State of U. P.*, A. 1957 S.C. 320.

7. *Rameswar v. State of Assam*, A. 1951 Assam 14.

8. *Sunder Singh v. State of U. P.*, A. 1956 S.C. 411.



should not grant the certificate in respect of all the accused where only the case of some of them warrants the issue of a certificate.<sup>9</sup>

### When to apply.

Under the Rules of the Allahabad High Court,<sup>10</sup> an application for a certificate of fitness under Art. 134 (1) (c) must be made either before or at the time of delivery of the judgment.

In the absence of any such rule,—though there is no limitation prescribed for an application for certificate under Art. 133 (1) (c) or art. 134 (1) (c),—an application would not be entertained after an inordinate delay which is unexplained.<sup>11</sup>

### Scope of hearing for certificate.

1. In an application for certificate under this clause, the High Court is solely concerned with the question whether, on the judgment of the High Court, any question of law or principle arises. It cannot reassess the evidence, come to its own conclusion different from that of the first Court, and then grant leave to appeal on the ground that the findings were not justified by the evidence on record. A certificate cannot be granted merely because the Court which hears the application takes a different view of the facts from the Court which heard the original appeal. It must be shown that there was a failure of justice by reason of the misapplication or omission to consider any established rule of law or natural justice.<sup>12</sup>

2. Where one Division Bench has dismissed an appeal, another Division Bench, dealing with an application under Art. 134 (1) (c), cannot examine the grounds of appeal, as if sitting in appeal over the decision of the other Division Bench.<sup>13</sup> The certificate can be granted only if there are complexities of law which require an authoritative interpretation by the Supreme Court and not on mere questions of fact.<sup>13</sup>

### Procedure relating to certificate.

1. Points which were not raised during the hearing of the appeal before the High Court cannot be raised in an application for certificate for leave to appeal to the Supreme Court,<sup>14</sup> particularly when it relates to facts.<sup>15</sup>

2. After the High Court grants a certificate for appeal to the Supreme Court, the High Court becomes *functus officio* and cannot, thereafter, grant a stay of further proceedings. The only remedy of the appellant in such cases is to file the appeal in the Supreme Court as early as possible and obtain a stay order from that Court.<sup>16</sup>

### Disposal of an application under Art. 134(1)(c).

An application for certificate for appeal under this provision should be disposed of with the greatest despatch.<sup>17</sup>

9. *Nar Singh v. State of U. P.*, A. 1954 S.C. 457.

10. *Bansi v. Hari*, A. 1956 All. 297 (304).

11. *State v. Jaiswal*, A. 1954 R.P. 9.

12. *Ramakantha v. State*, A. 1957 Orissa 10.

13. *Sidheswar v. State of W. B.*, A. 1958 S.C. 143 (145).

14. *Jairam v. State*, A. 1954 Bom. 206.

15. *Roy v. State*, A. 1953 Orissa 266.

16. *Harishankar v. State of M. P.*, (1953) 8 D.L.R. 130 (Nag.).

17. *Bisnu v. State of U. P.*, A. 1954 S.C. 714.

**Form of Order in application for certificate.**

1. The proper order, allowing an application under Art. 134 (1) (c) is not that 'leave to appeal is granted',<sup>18,19</sup> but that

"a certificate do issue that the case is a fit one for appeal to the Supreme Court".<sup>20</sup>

2. In view of the above observation of the Supreme Court, Desai J. of the Allahabad High Court<sup>21</sup> seems to be justified in saying that it is not correct to describe an application for a certificate under Art. 132 (13) 133 (1) (c) or 134 (4) (c) as an application for "leave to appeal". On such an application, the High Court is merely called upon to certify whether the conditions referred to in the Articles exist or not. It is for the Supreme Court to decide whether appeal lies or not, even though the High Court has granted a certificate.

**Certificate not conclusive.**

1. A certificate granted under Art. 134 (1) (c) does not preclude the Supreme Court from determining whether the certificate was rightly granted. In other words, the Supreme Court is not necessarily bound to hear an appeal on the merits merely because a certificate has been granted by the High Court.

2. If on the face of it, the Supreme Court is satisfied that the High Court has not properly exercised its discretion under Art. 134 (1) (c), the Supreme Court may either remit the case or exercise the discretion itself,<sup>22</sup> and treat the appeal as one under Art. 136.<sup>23</sup> The Court may also dismiss<sup>23,24</sup> the appeal *in limine* if it finds no sufficient reason to interfere under Art. 136.

**Scope of an appeal filed under Art. 134(1)(c).**

1. The Supreme Court is not an ordinary court of criminal appeal and appeal lies to it under Art. 134 only in some specified cases. In such cases, the function of the Supreme Court is not so much to weigh and appraise the evidence again, to find out the guilt or innocence of the accused as to see that the accused gets a *fair trial* on proper evidence.<sup>25</sup>

(i) In an appeal under Art. 134, the Supreme Court will not reassess evidence and argument on a point of *fact* which did not prevail with the Courts below.<sup>1</sup> The Supreme Court would refuse to act as a third Court of facts, to set aside a *concurrent* finding of fact, in the absence of any *compelling* reason.<sup>2</sup>

(ii) The Supreme Court would not allow a question to be raised for the first time, in an appeal under the present Article, when it is a question of *fact* which has to be investigated afresh,<sup>3</sup> and which was not taken before the Bench which granted the certificate.<sup>4</sup>

2. On the other hand,—

(i) Though the Supreme Court would not, usually, depart from the practice of declining to reassess the evidence, it would raise a benefit

18. *Baladn v. State of U. P.*, A. 1956 S.C. 181.

19. *Govindlal v. State of W. B.*, (1957) S.C. [Cr. App. 62/55].

20. *State v. Mukhtar Singh*, A. 1957 All. 505 (615).

21. *Nar Singh v. State of U. P.*, A. 1954 S.C. 457.

22. *Baladn v. State of U. P.*, A. 1956 S.C. 181.

23. *Haripada v. State of W. B.*, (1956) S.C.R. 639.

24. *Sunder Singh v. State of U. P.*, A. 1956 411.

25. *Darshan Singh v. State of Punjab*, (1953) S.C.R. 319.

1. *Lachman Singh v. The State*, A. 1952 S.C. 167 (169).

2. *Damodaran v. State of T. C.*, A. 1953 S.C. 462 (466).

3. *Rameshwar v. State of Assam*, (1953) S.C.R. 126.

4. *Narayandas v. State of W. B.*, A. 1959 S.C. 1118 (1121).



of doubt in favour of the accused, *e.g.*, where the defence of the accused, which is a reasonable one, is supported by two *prosecution* witnesses.<sup>5</sup>

(ii) Where the Courts below found the accused guilty, relying on an admission of the accused which did not, in fact, exist, the proper order the Supreme Court would make is an order directing a rehearing, after excluding the consideration of the alleged admission.<sup>6</sup>

(iii) The Supreme Court would certainly interfere where there is a defect in the judgment of the High Court which goes to the root of the matter, *e.g.*, where one of the Judges who signed the judgment dies before it was delivered, for, 'pronouncement' or 'delivery' of the judgment in open Court is an essential requirement of a judgment under the Criminal Procedure Code.<sup>7</sup>

(iv) Where there is such an irregularity in the proceeding as cannot be cured under s. 537, Cr. P. C.<sup>8,9</sup>

### Question of law.

The following have been held to be questions of law, *not* of fact, in relation to criminal proceedings:

(a) The nature of the offence deducible from proved facts,<sup>9</sup> but not the respective degrees of guilt of the various accused.<sup>9</sup>

(b) What is or is not evidence<sup>10</sup> or whether a particular evidence is admissible.<sup>11</sup>

(c) Whether a charge is valid under the law.<sup>12</sup>

(d) Alleged severity of a sentence [Expl. to s. 418, Cr. P. C.].

### Refusal of application under Art. 134(1) (c).

Notwithstanding the refusal by the High Court of an application under Art. 134(1) (c), the accused can apply to the Supreme Court for special leave to appeal, under Art. 136.<sup>13,14</sup>

<sup>15</sup>**135.** Until Parliament by law otherwise provides, the

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

immediately before the commencement of this Constitution under any existing law.

### Scope of Art. 135.

1. Arts. 133 and 134, being prospective in their operation, affect only suits and proceedings instituted after commencement of the Constitution. Suits and proceedings instituted before the Constitution

5. *Hate Singh v. State of M. B.*, A. 1953 S.C. 468 (471).

6. *Surendra v. State of U. P.*, (1954) S.C.R. 330.

7. *Magga v. State of Rajasthan*, A. 1956 S.C. 174.

8. *Prem Nath v. State of Delhi*, A. 1956 S.C. 4 (8).

9. *Dharman v. State of Punjab*, A. 1957 S.C. 324 (326).

10. *Reball v. Emp.*, 32 C.W.N. 945.

11. *Amtruddin v. Emp.*, 45 Cal. 557.

12. *Ramjanam v. Emp.*, A. 1935 Pat. 357.

13. *Haripada v. State of W. B.*, (1956) S.C.R. 639.

14. *Cf. Asgarali v. State of Bombay*, A. 1957 S.C. 503.

15. Article 135 shall not apply to the State of Jammu and Kashmir.

are governed by Art. 135 and the pre-Constitution law determines the right of appeal from decrees or orders passed therein, even though such decrees or orders themselves were made after commencement of the Constitution. The right of appeal which vested in the parties at the institution of those suits or proceedings is not retrospectively affected by anything in the Constitution.<sup>16</sup>

2. In the result, an appeal shall, as of right, lie to the Supreme Court from the judgment passed (even after 26-1-50) in a suit instituted before the Constitution, even though the value of the subject-matter is less than Rs. 20,000/- (but above Rs. 10,000/-), by virtue of the provisions of Civil Procedure Code (ss. 109-110, as they stood before amendment by the Adaptation of Laws Order, 1950) read with the Government of India Act, 1935 and the Federal Court (Enlargement of jurisdiction) Act, 1947.<sup>16</sup>

### 'Matter'.

This is a word of wide import and includes vested rights of appeal.<sup>17</sup>

**'Matter to which the provisions of Art. 133 or Art. 134 do not apply'.**

Such matters, e.g., are—

Petition under s. 10 of the Bombay Hereditary Offices Act, 1874.<sup>17</sup>

**16136.** (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

### Art. 136: Appeal by special leave.

1. Notwithstanding provision for regular appeals from proceedings before the High Courts, in arts. 132-4, there may still remain some cases, where justice might require the interference of the Supreme Court, with decisions not only of the High Courts outside the purview of the foregoing articles, but also of any other Court or tribunal of the land. The power of the Supreme Court to grant special leave to appeal from the decision of any Court or tribunal save military tribunals, is not subject to any constitutional limitation, and is left entirely to the discretion of the Supreme Court.<sup>18</sup> Broadly speaking, the Supreme Court would exercise this power to give relief to the aggrieved party in cases where the principles of natural justice have been violated, even though the party may have no footing to appeal as of right.

16. *Garikapati v. Subbiah*, A. 1957 S.C. 540.

17. *Yellappagouda v. Basangouda*, (1960) S.C. [C.M.P. 530/59].

18. Article 136 has been extended to the State of Jammu and Kashmir by the Constitution (Application to J. & K.) Amendment Order, 1960.

19. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188 (193).



2. Under this Article the Supreme Court shall have the power to grant special leave to appeal—

- (a) from any judgment, decree, determination, sentence or order,
- (b) in any cause or matter.
- (c) passed or made by any Court or tribunal, in the territory of India.

3. Arts. 133-4 relate to civil and criminal proceedings, respectively. If a proceeding is neither civil nor criminal and does not involve any question of constitutional interpretation (Art. 132), the only way in which a party may appeal from an order made in such a proceeding is by obtaining special leave of the Supreme Court itself, under the present Article.<sup>21</sup>

#### Jurisdiction under Art. 136 cannot be barred by statute.

The extraordinary power conferred by Art. 136 cannot be taken away by any legislation short of constitutional amendment.<sup>21</sup> Conclusiveness or finality given by a statute to any decision of a court or tribunal cannot deter the Supreme Court from exercising this jurisdiction.<sup>22, 23</sup>

#### General principles relating to the granting of special leave under Art. 136.

1. Art. 136 of the Constitution vests wide discretionary power in the Supreme Court which is to be exercised sparingly and in exceptional cases only. By virtue of this Article, the Supreme Court can grant special leave to appeal in 'any cause or other matter'—civil, criminal or otherwise, and from any court or tribunal in India. The only uniform standard that can be laid down regarding these variety of cases is that the power shall be exercised only where special circumstances are shown to exist.<sup>23</sup>

2. It is a discretionary reserve power conferred on the Court and cannot be so construed as to confer a right of appeal to a party where he has none under the law.<sup>1</sup>

3. It is, however, plain that when the Supreme Court reaches the conclusion that a person has been dealt with *arbitrarily* or that a Court or tribunal has not given a fair deal to a litigant, then no *technical* hurdles of any kind like the finality of finding of facts, or otherwise can stand in the way of the exercise of this power.<sup>2</sup>

On the other hand,—

1. In the exercise of this extraordinary power, the Supreme Court will not assume a jurisdiction which is not warranted by the provisions of the Constitution nor offer to provide a relief which has been omitted in the Constitution, for, that will be tantamount to making legislation which is never the function of the Court.<sup>3</sup>

#### Delay in filing application.

1. An application for special leave must be filed within the time limited by the Rules of the Supreme Court. The fact that the Petitioners

20. *State v. Muktar Singh*, A. 1957 All. 505 (510).

21. *Durgashankar v. Raghuraj*, A. 1954 S.C. 520 (523).

22. *Dhakeswari Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941 (949).

23. *Rafkrushna v. Binod*, A. 1954 S.S. 202 (204).

24. *Raigarh Jute Mills v. Eastern Ry.*, A. 1958 S.C. 525 (528).

25. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188 (139).

1. *B. C. P. W. v. Employees*, A. 1959 S.C. 633 (635); *State of Bombay v. Rasy*, A. 1960 S.C. 391.

2. *Dhakeswari Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941 (949).

3. *Janardhan Reddy v. The State*, (1950) S.C.R. 940.

had to collect money from a large number of persons who were interested in the case, is not sufficient for condoning delay in filing an application.<sup>4</sup>

2. An intending appellant who has not applied for or obtained the leave of the High Court and who does not say a word by way of explanation as to why he did not apply to the High Court and as to why there has been great delay in applying to the Supreme Court should not get special leave from the Supreme Court for the mere asking.<sup>5</sup>

#### Where relief would be nugatory.

1. Special leave to appeal would not, as a rule, be granted where the appeal had become academic, for instance, where the relief sought in the proceeding had become nugatory owing to subsequent events.<sup>6</sup>

2. It may, however, be granted—

Where though the relief sought had become nugatory, there are pronouncements in the judgment or order appealed against which would affect the appellant substantially.<sup>7</sup>

#### Existence of alternative remedy.

The existence of an alternative remedy, such as a Letters Patent appeal from the decision of a Single Judge of the High Court, is no ground for taking away the jurisdiction of the Supreme Court under Art. 136. But if this fact is brought to the notice of the Supreme Court in *proper time*, it may refuse to grant special leave or may even revoke a leave already granted.<sup>8</sup>

#### Scope of appeal under Art. 136.

In granting special leave to appeal, the Court may impose special limitations upon the subject-matter of appeal,<sup>9</sup> or the materials to be used at the hearing. But in the absence of any such limitation, it is open to the appellant to rely on any ground which would have been open to him in a case of regular appeal.

On the other hand,—

1. The circumstance that an appeal has been admitted by special leave does not entitle the applicant to open out the whole case and contest all the findings of fact and raise every point which could be raised in the High Court. Even at the final hearing, only those points can be urged which are fit to be urged when special leave to appeal is asked for. It would be illogical to apply two different standards at two different stages of the same case.<sup>10,11</sup>

2. This does not mean that once special leave has been granted (on *ex parte* motion) restrictions cannot be imposed by the Court at the time of hearing the appeal.<sup>12</sup>

3. In the appellate jurisdiction, the Supreme Court will not decide hypothetical questions.<sup>11</sup>

4. In an appeal from an order under Art. 226, the Supreme Court would refuse to entertain a question not raised in the petition or before the High Court.<sup>12</sup>

4. *Banarsidas v. State of U. P.*, A. 1956 S.C. 520 (522).

5. *Aswini v. Arabinda*, A. 1952 C.C. 369 (386), Das J.

6. *Chief Commr. v. Radhey Shyam*, A. 1957 C.S. 304 (306).

7. *Union of India v. Kishorilal*, A. 1959 S.C. 1362 (1365).

8. *C. J. Topandas v. State of Bombay*, A. 1956 S.C. 33 (34).

9. *Pritam Singh v. State*, (1950) S.C.R. 453; A. 1950 S.C. 169.

10. *B. C. P. W. v. Employees*, A. 1959 S.C. 632 (635); *Balwan v. Lakshmi*, A. 1960 S.C. 770 (775).

11. *Central Bank of India v. Workmen*, A. 1960 S.C. 12 (28).

12. *Md. Ghouse v. State of Andhra*, A. 1957 S.C. 246 (249).



**'Any cause or matter'.**

This expression is of a very wide import.<sup>12a</sup> It covers proceedings other than civil or criminal, *e.g.*,—

(i) Decision of a High Court in a reference under s. 57, Stamp Act;<sup>13</sup> or ss. 162, 153C, the Companies Act;<sup>14</sup> or s. 432, Cr. P. C.,<sup>15</sup> or s. 66 (1), Income-tax Act;<sup>16,17</sup> or s. 21 of the Bihar Sales Tax Act;<sup>18</sup> or similar provisions in the Excess Profits Tax Act,<sup>19</sup> Business Profits Tax Act, 1947.<sup>20</sup>

(ii) Order of the High Court under ss. 13-14 of the Legal Practitioners Act;<sup>21</sup> or s. 12, Bar Councils Act.<sup>21</sup>

**A. Appeal by Special Leave in civil cases.**

1. The Supreme Court has entertained appeal by Special Leave from judgments in civil cases where substantial questions of law have been involved, while the monetary test laid down in Art. 133 (1) was not satisfied, *e.g.*,

(i) Where the decree of the High Court in a suit for declaration that a deed of gift executed by a limited owner in favour of her daughter was not binding on the reversioner was challenged on the ground of a wrong interpretation of the principles of the Mitakshara Law and of s. 123, Transfer of Property Act.<sup>22</sup>

(ii) Where the High Court came to a wrong conclusion from the evidence as to non-access between the parents of the plaintiff, thus making an erroneous decision on a substantial question of law, the question of legitimacy being one of law in view of the presumption of law contained in s. 112 of the Evidence Act.<sup>23</sup>

(iii) Where the High Court erred on the question of law whether a property bequeathed by a father to his sons and intended to be the absolute property of the legatees or ancestral property in which the heirs of the legatees were to have interests.<sup>24</sup>

(iv) Where the High Court had allowed an amendment at the appellate stage after the period of limitation for the suit had already expired.<sup>25</sup>

(v) Where the High Court had dismissed an appeal against an order refusing an objection under s. 47 of the C. P. Code, involving substantial questions of law;<sup>1</sup> or decreed a suit rejecting the objection that it was barred under s. 47, C. P. Code.<sup>2</sup>

(vi) Where the decree in a suit for declaration of title and partition involved a substantial question of law, *viz.*, of adverse possession between co-heirs.<sup>3</sup>

12a. *Pritam Singh v. State*, (1950) S.C.R. 453.

13. *Cf. Board of Revenue v. Bentrall*, A. 1956 S.C. 35.

14. *Cf. R. E. S. Corpn. v. Nageswara*, A. 1956 S.C. 213.

15. *A. S. Krishna v. State of Madras*, A. 1957 S.C. 297 (300).

16. *Cf. India United Mills v. Commr. of E. P. T.*, A. 1955 S.C. 70.

17. *Oriental Investment Co. v. Commr. of I. T.*, (1958) S.C.R. 49.

18. *Raghubar v. State of Bihar*, (1958) S.C.R. 37.

19. *J. K. Trust v. Commr. of I. T.*, (1958) S.C.R. 65.

20. *Cf. Lalit Mohan v. Advocate-General*, A. 1957 S.C. 250 (251).

21. *Nageshwara v. Judges*, A. 1955 S.C. 223.

22. *Kamla v. Bachulal*, A. 1957 S.C. 344 : (1957) S.C.R. 452.

23. *Chilukuri v. Chilukuri*, (1954) S.C.R. 424.

24. *Arunachala v. Muruganatha*, (1954) S.C.R. 243.

25. *P. H. Patil v. Patil*, A. 1957 S.C. 363.

1. *Rajes v. Shanil*, A. 1957 S.C. 255 (257) : (1957) S.C.R. 77.

2. *Ramanna v. Nallaparaju*, A. 1956 S.C. 87.

3. *Lakshmi Reddy v. Lakshmi Reddy*, A. 1957 S.C. 314 : (1957) S.C.R. 195.

(vii) Where a suit for declaration of the plaintiff's status as adopted son raised the question as to whether a widow's power to adopt terminates by reason of subsequent changes in the family.<sup>4</sup>

(viii) Where the High Court had dismissed in limine an application under Art. 226 for quashing an order of an Industrial Tribunal alleged to be against the principles of natural justice.<sup>5</sup>

2. If such substantial questions are involved, the Court may grant special leave to appeal under Art. 136 where the High Court had rejected an application for certificate under Art. 133 (1) (c), e.g.—

(a) Where the High Court had dismissed a petition under Art. 226 in limine, without inquiring into the allegation of *mala fides* against the Government.<sup>6</sup>

(b) Where the decision of the High Court in revision against the order of the Rent Controller involved a substantial question of law, viz., whether the W. B. Premises Rent Control Act applies to the premises in question.<sup>7</sup>

(c) Where the High Court had set aside, on appeal, an order of a Single Judge dismissing an application under Art. 226 for *certiorari* to quash an order of a Labour Appellate Tribunal, on the ground that the order of the Tribunal was not without jurisdiction as the Appellate Bench had held.<sup>8</sup>

(d) Where the High Court has dismissed an application under Art. 227.<sup>9</sup>

On the other hand—

In the exercise of its overriding powers under Art. 136, the Supreme Court will not interfere with a matter in the discretion of the High Court except in *very exceptional cases*,<sup>9</sup> e.g., in the matter of adding an unnecessary party under O. 1, r. 10, C. P. Code;<sup>10</sup> or of improperly demanding security as a condition of defence under O. 37, r. 3.<sup>11</sup>

Though no hard and fast rules can be laid down in matters relating to the exercise of a discretion, the Supreme Court will interfere where the discretion is exercised arbitrarily, or is based on a misunderstanding of the principles that govern its exercise.<sup>11</sup>

#### Interference with findings of fact.

The Court would not go behind the findings of fact unless there is a sufficient ground for doing so.<sup>12,13</sup>

I. It has been held that there was *no* sufficient reason—

Where the High Court, but for a confusion between two of the witnesses, did examine with care the oral evidence relating to the alleged gift which was in question.<sup>12</sup>

II. But the Supreme Court would interfere—

1. Where on the evidence on the record no Court could, as a matter of legitimate inference, arrive at the conclusion that the lower Court has.<sup>14</sup>

4. *Gurunath v. Kamalabai*, A. 1955 S.C. 206.

5. *Punjab National Bank v. Sri Ram*, A. 1957 S.C. 276 (278); (1957) S.C.R. 220.

6. *Cf. B. I. Corp. v. Industrial Tribunal*, A. 1957 S.C. 354.

7. *Karnani Properties v. Augustine*, A. 1957 S.C. 309; (1957) S.C.R.

20.

8. *Callex v. Fernandes*, A. 1957 S.C. 326.

9. *Shareef v. Judges of Nagpur H. C.*, A. 1955 S.C. 19 (25).

10. *Razia Begum v. Anwar*, A. 1958 S.C. 886 (895).

11. *Santosh v. Mool Singh*, (1959) S.C.R. 32 (38).

12. *Kamla v. Bachulal*, A. 1957 S.C. 434 (438); (1957) S.C.R. 452.

13. *Chattanatha v. Ramachandra*, (1955) 2 S.C.R. 477 (480).

14. *White v. White*, A. 1958 S.C. 441 (442).



2. Where the two lower Courts of appeal were under a misapprehension as to the finding of the trial Court of a material fact, the Supreme Court will examine the evidence on the point, itself.<sup>15</sup>

#### **Applicability of O. 45, r. 8, C. P. Code to appeals under Art. 136.**

The applicability of O. 45, r. 8, C. P. Code to appeals under Art. 136 is restricted. Ordinarily, when a High Court grants a certificate for appeal to the Supreme Court, it is the High Court which retains full control and jurisdiction over the subsequent proceedings till the appeal is admitted. The jurisdiction of the Supreme Court begins after the appeal is finally admitted.

When, however, the appeal comes to the Supreme Court on the strength of a special leave granted by it, the position is different. In such cases, the order of the Supreme Court itself operates as an admission of the appeal as soon as the conditions in the order relating to security or deposit are complied with. In such a case, it is not necessary for the appellant to move the High Court again, for a formal admission of the appeal. As soon as the directions laid down in the order granting special leave are complied with, it would be the duty of the Registrar of the Supreme Court to issue a notice of admission of the appeal for service upon the respondent. In default of issue of such notice, the appellant cannot be held responsible for laches in the prosecution of his appeal.<sup>16</sup>

#### **Interference with interlocutory order passed in proceedings under Art. 226.**

Ordinarily, the Supreme Court would not interfere with interlocutory orders passed by a High Court in a proceeding under Art. 226 while it is still pending before the High Court.<sup>17</sup> But it would interfere with an interlocutory order in a case pending before the High Court where there are exceptional and unusual features justifying such interference, e.g.—

The High Court in an application under Art. 226 brought by the respondents made an interim order on 10-6-57 that "*status quo ante* be maintained." By a misapprehension of this order, the Excise Commissioner directed that the possession should be recovered from the appellant and given to the respondents. The appellant moved the High Court for quashing this order of the Excise Commissioner which was palpably wrong. The High Court issued a rule but refused to grant an interim stay of the order directing possession to be given. The petitioner went on moving petitions for vacating the order of possession but the High Court could not hear these petitions until the long vacation in September, 1957, because no Division Bench could be constituted for want of a Judge.

The Supreme Court found that the order directing the appellant to be dispossessed was without any authority of law and also found that there was no merit in the case made by the respondent in the application under Art. 226 itself where the interlocutory order of the High Court was made. Hence, the interlocutory order was quashed.<sup>18</sup>

#### **Practice and Procedure.**

The Supreme Court will now allow a party to set up a case not made in his pleading and which was not allowed to be argued by the High Court.<sup>19</sup>

15. *Kaushal Kishore v. Ram Dev*, A. 1958 S.C. 990 (1001).

16. *Shiva Jute Bailing v. Hindley & Co.*, (1955) 2 S.C.R. 243 (249-50).

17. *Nagendra v. Commr.*, A. 1958 S.C. 398 (413) : (1958) S.C.R. 1240.

18. *Lilachand v. Mallappa*, A. 1960 S.C. 85.

### B. Principles relating to grant of special leave in criminal cases.

1. In a criminal case, the Supreme Court will grant special leave to appeal only in those cases where it is shown that exceptional and special circumstances exist or that substantial and grave injustice has been done or that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.<sup>9,11</sup> It would not grant special leave to appeal on grounds which would not sustain the appeal itself<sup>10</sup> that is, unless it is manifest that, by a disregard of the forms of legal process or by violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.<sup>12</sup>

2. The Supreme Court has granted special leave to appeal from the judgment of the High Court in a criminal case :

(a) Where the High Court reversed a judgment of acquittal and sentenced the accused to transportation for life (so that Art. 134 (1) (a) was not applicable), and there was a passage in the judgment of the High Court which suggested that the Court had ignored the presumption of innocence in favour of the accused.<sup>13</sup>

(b) Where there is a serious question of law affecting the foundation of the conviction, e.g.—

Whether the conviction of an accused under s. 120B, I.P.C., is maintainable where other alleged conspirators have been acquitted.<sup>14</sup>

(c) Special leave was granted to the State—

Where the order of discharge passed by a Magistrate at the instance of the Public Prosecutor, under s. 494, Cr. P. C. was set aside by the High Court on the ground that the Court should not have granted the consent to the withdrawal of the Public Prosecutor and it was contended on behalf of the State that the view taken by the High Court was erroneous and was likely to have repercussions in the State beyond what was involved in the particular case.<sup>15</sup>

3. The Supreme Court does not generally interfere with interlocutory orders, e.g., order of remand.<sup>16a</sup>

### C. Principles governing disposal of criminal appeal on special leave.

1. The Court will not interfere with judgments or orders of Criminal Courts, on special leave—

(i) To assume a jurisdiction which is not warranted by the other provisions of the Constitution.<sup>17</sup>

(ii) Where the plea of misjoinder of charges is without substance.<sup>18</sup>

(iii) Merely to question a finding of fact which is in favour of the accused.<sup>19</sup>

(iv) To examine the reasons for coming to certain conclusions of fact.<sup>19</sup>

9. *Pritam Singh v. The State*, (1950) S.C.R. 453.

10. *Hem Raj v. State of Ajmer*, (1954) S.C.R. 1133.

11. *Sadhu Singh v. State of Pepsu*, A. 1954 S.C. 271.

12. *Mohinder Singh v. State*, A. 1953 S.C. 415.

13. *Nisar v. State of U. P.*, A. 1957 S.C. 366 : (1957) S.C.R. 657.

14. *Topandas v. State of Bombay*, (1955) 2 S.C.R. 881.

15. *State of Bihar v. Ram Naresh*, A. 1957 S.C. 389 (392) : (1957) S.C.R. 279.

16a. *Madanraj v. Jalamchand*, A. 1960 S.C. 744.

16. *Janardan v. The State*, (1950-51) C.C. 233.

17. *Bhagat Singh v. The State*, (1952) S.C.R. 371.

18. *Zabar Singh v. State of U. P.*, A. 1957 S.C. 465.

19. *Swami v. State*, A. 1960 S.C. 7.



(v) On ground of mistakes of a technical nature which have not occasioned any failure of justice.<sup>19a</sup> Thus,—

(a) Whether action should be taken under s. 195 of the Cr. P. C. is a matter primarily for the Court which hears the application, and is not a matter for interference by the Supreme Court in exercise of its extraordinary powers under Art. 136.<sup>20</sup>

(b) Every error or omission not in compliance with s. 342 of the Criminal Procedure Code does not necessarily vitiate the trial. Errors of this type fall within the category of curable irregularities, and the question whether the trial is vitiated depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused<sup>21</sup> :

(i) The Court would set aside the conviction whether omission to examine the accused under s. 342 was not a mere technical error.<sup>22</sup>

(ii) It is not a sufficient compliance with the section to generally ask the accused that having heard the prosecution evidence what he has to say about it. He must be questioned *separately* about each material circumstance which is intended to be used against him. The questions must be fair and be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Where there is a violation of these principles, the Supreme Court will interfere by special leave.<sup>23,24</sup>

2. On appeal by the State, the Supreme Court will not interfere to resuscitate a stale matter, where public interest does not so require.<sup>25</sup>

3. On the other hand, the Court will interfere in cases of substantial injustice, e.g.,—

(i) Where the High Court accepted as correct all the essential facts constituting the offence with which the accused was charged, but passed an order of *acquittal* on a misconception as to the effect of a decision of the Supreme Court.<sup>1</sup>

(ii) Where the Court below had committed an error of law which constituted the very foundation of the offence, *viz.*, upon the question whether *mens rea* was an essential ingredient for conviction for contravention of cl. 22 and 27 of the Motor Spirit Rationing Order, 1941, promulgated under r. 81 (2) of the Defence of India Rules, 1939, or failed to consider the plea of private defence in the light of the ingredients laid down by the law.<sup>2</sup>

(iii) Where of the many items set out in the charge under s. 147 of the Indian Penal Code as constituting the common object of the alleged unlawful assembly, dispossession of the complaint is the most important one, it is incumbent on the Appellate Court to record a clear finding as to possession and its failure to record it on the vital issue in the case, without deciding which the question as to who was the aggressor could not properly and satisfactorily be determined, is apt to lead to injustice of such a serious substantial character as to warrant the interference of the Supreme Court, on special leave.<sup>3</sup>

(iv) It is not the practice of the Supreme Court to interfere by special leave in the matter of punishment imposed for crimes com-

19a. *Habeeb v. State of Hyderabad*, (1954) S.C.R. 475.

20. *Virindar Kumar v. State of U. P.*, A. 1956 S.C. 153 (158).

21. *Ajmer Singh v. The State*, A. 1953 S.C. 76.

22. *Machander v. State of Hyderabad*, (1955) 2 S.C.R. 524 (530).

23. *Tara Singh v. The State*, (1950) S.C.R. 729.

24. *Ravula Hariprasad v. The State*, (1951) S.C.R. 322.

25. *State of Bihar v. Hiralal*, A. 1960 S.C. 48 (51).

1. *State of Bihar v. Basawan Singh*, A. 1958 S.C. 500 (507).

2. *Amjad v. The State*, (1952) S.C.R. 567.

3. *Kapildeo v. The King*, A. 1950 F.C. 80.

mitted, except in exceptional cases where the sentences are *unduly harsh* and do not really advance the ends of justice. Thus, though the offence of black-marketing calls for a certain amount of severity, yet, when a substantial sentence of imprisonment (e.g., a fine of Rs. 42,300/- in addition to a year's imprisonment, for black-marketing in 115 barrels of kerosene oil) has been awarded especially to a commission agent, the imposition of unduly heavy fines which may be justified to some extent in the case of principals, is not called for in the case of commission agents (the Supreme Court), accordingly, reduced the fine to Rs. 4,000/- in all.<sup>4</sup>

### Interference with findings of fact.

1. In a criminal appeal on special leave the Supreme Court will not constitute itself into a third Court of fact and re-weigh the evidence which has impressed the assessors and the Courts below.<sup>5-7</sup> Hence,

It will not interfere with the judgment of the Courts below only on ground of credibility of witnesses, when the prosecution story is not *prima facie* incredible or improbable,<sup>8</sup> or the alleged error of the Court has not resulted in a failure of justice.<sup>9</sup>

2. On the other hand, though the Supreme Court will not, ordinarily, look beyond the *findings of fact* arrived at by the Court below, the Court will interfere—

Where there has been in substance no fair and proper trial, or the findings of the fact are such as are shocking to the judicial conscience of the Court,<sup>10</sup> that is, where the evidence is such that no tribunal could legitimately infer from it that the accused is guilty of the offence.<sup>11</sup> E.g.—

(a) Where the Courts below have arrived at a decision on the plea of *alibi* in disregard of the principle that the standard of proof which is required in regard to that plea must be the same as the standard which is applied to the prosecution evidence and that in both cases it should be a reasonable standard<sup>12</sup> or where the circumstances relied upon by the Courts were not inconsistent with the innocence of the accused,<sup>13</sup> or,

(b) Where the Court below relied upon the *confession* of a co-accused or the testimony of an accomplice without sufficient independent evidence in corroboration,<sup>14</sup> or where the Courts below, in coming to the conclusion that the confession was voluntary, failed to note that the prosecution offered no explanation why the C.I.D. Inspector kept the accused in *prolonged* custody preceding the making of the confession.<sup>15</sup>

(c) Where a finding of fact has been arrived at on the testimony of a witness who is not a person whom any reliance could be placed and who was himself a party to the preparation of a forged document in the suit and the Courts below have departed from the rule of prudence that such testimony should not be accepted unless it is corroborated by some other evidence on the record, a finding of that charac-

4. *Adamji v. The State of Bombay*, (1952) S.C.R. 172.

5. *Prilam Singh v. State*, (1950) S.C.R. 453.

6. *Mulk Raj v. State of U. P.*, A. 1950 S.C. 902.

7. *Tara Singh v. State*, (1950) S.C.R. 729.

8. *Brij Bhukhan v. State of U. P.*, A. 1957 S.C. 474.

9. *Haripada v. State of W. B.*, A. 1956 S.C. 757 (759).

10. *Mohinder Singh v. The State*, (1950) S.C.R. 821.

11. *Hanumant v. State of Madhya Pradesh*, A. 1952 S.C. 343.

12. *Kashmira Singh v. State of Madhya Pradesh*, (1952) S.C.R. 526.

13. *Nathu v. State of U. P.*, A. 1956 S.C. 56 (59).



ter may be reviewed even on special leave if the other circumstances of the case require it, and substantial grave injustice has resulted.<sup>14,15</sup>

(d) Where the appellant has been convicted notwithstanding the fact that the evidence was wanting on a most material part of the prosecution case.<sup>16</sup>

(e) Where it appears that the High Court has not at all applied its mind to the appreciation of the evidence and grave injustice has resulted therefrom.<sup>17</sup>

(f) Where the accused has been convicted of murder, without apprehending the true effect of a *material change* in the versions given by the witnesses immediately after the occurrence and at the trial with respect to the nature and character of the offence.<sup>18,19</sup>

(g) Where the accused has been convicted of murder on the opinion of a third Judge (in view of difference as to guilt between two Judges) who, again, has differed on the question of sentence.<sup>20</sup>

(h) Where the finding of fact leads to a conclusion which is not tenable at law, e.g., where the accused was convicted for having entered into a conspiracy to murder, though the persons with whom he was said to have conspired, were acquitted.<sup>21</sup>

3. Though the Supreme Court does not ordinarily interfere with a concurrent finding of fact,<sup>22</sup> when the finding omits to notice very important points in the accused's favour which swing the balance the other way, it will not let the finding stand.<sup>23</sup> Similarly, the Supreme Court will interfere where the conclusions reached by the Courts below are so patently opposed to the well-established principles of judicial approach,<sup>24</sup> as to amount to a miscarriage of justice.<sup>25</sup>

#### Appeal against acquittal, under s. 417, Cr. P. C.

1. Though in an appeal against acquittal under s. 417 of the Cr. P. C., the High Court has full power to review the evidence upon which the order of acquittal was founded, the judgment of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed by the High Court only for substantial and compelling reasons.<sup>26,27</sup>

2. In the following cases, the Supreme Court allowed the appeal and restored the judgment of acquittal—

(a) Where the Sessions Judge had taken a reasonable view of the case in acquitting the accused in accordance with the unanimous opinion of the assessors but the High Court reversed the order of acquittal relying upon some witnesses overlooking the weighty comments of the Sessions Judge upon their evidence.<sup>28</sup>

14. *Bhagwan v. State of Rajasthan*, A. 1957 S.C. 589: (1957) S.C.R. 854; *Khunhahammad v. State of Madras*, A. 1960 S.C. 661.

15. *Hanumant v. State of M. P.*, (1952) S.C.R. 1091.

16. *Mohinder Singh v. State*, (1950), S.C.R. 821.

17. *Surjan v. State of Rajasthan*, A. 1956 S.C. 425 (431).

18-11. *Sadhu Singh v. State of Pepsu*, A. 1954 S.C. 271.

12. *Pandurang v. State of Hyderabad*, (1955) 1 S.C.R. 1083.

13. *Zabar Singh v. State of U. P.*, A. 1957 S.C. 465 (466).

14. *Ram Narain v. State of Punjab*, A. 1955 S.C. 322; *Inder Singh v. State of Pepsu*, A. 1955 S.C. 439; *Kunjilal v. State of M. P.*, (1955) 1 S.C.R. 872 (876).

15. *Kashmira Singh v. State of M. P.*, A. 1952 S.C. 159.

16. *Sarwan Singh v. State of Punjab*, A. 1957 S.C. 637 (640).

17. *Ratan v. State of Bihar*, A. 1959 S.C. 18 (21).

18. *Surajpal v. The State*, (1952) S.C.R. 193 (201).

19. *Amar Singh v. State of Punjab*, (1953) S.C.R. 418 (423).

(b) Where the accused, charged of murder, repudiated his confession at the earliest opportunity as having been made under Police threats administered to him at night while in jail custody and there was evidence to show that the Police had access to him there, and there was nothing to displace his statement that he was threatened, the finding of the Sessions Judge that the confession was not voluntary in character was fair and reasonable but the High Court had set aside the order of acquittal, without any compelling reason.<sup>20</sup>

3. On the other hand, the Court would not exercise this power to reopen a stale matter, e.g., to quash an order of discharge in respect of a statutory offence which is alleged to have been committed several years ago.<sup>21</sup>

### Consideration of evidence by Supreme Court.

1. Where the finding of fact by the High Court is perverse or inadequate and has resulted in a miscarriage of justice, the Supreme Court may itself hear the appeal on the evidence, instead of remanding the case to the High Court for a reconsideration of the evidence, where the latter course would lead to unnecessary delay or hardship, e.g., where the appellants are under a sentence of death.<sup>22,23</sup>

2. But where, in making a reference under s. 307, Cr. P. C., the High Court failed to consider the entire evidence as required by sub-sec. (3) of that section, the Supreme Court remanded the matter to the High Court for compliance with s. 307 (3), instead of examining the evidence itself.<sup>24</sup>

### Practice and Procedure.

1. The Supreme Court would not allow a new point (which was not taken before the High Court) to be raised before it, unless it is a question of pure law,<sup>25</sup> e.g.,

Whether in a case triable by a Court of Session, the Public Prosecutor can apply for withdrawal at the committal stage.<sup>1</sup>

2. But questions which, if admitted, would necessitate a retrial, e.g., that the examination of the accused under s. 342 was inadequate or<sup>2</sup> misjoinder of charges,<sup>3</sup> cannot be raised for the first time, before the Supreme Court in an appeal on special leave. The same principle has been allowed in an appeal from an income-tax proceeding where to admit the new point would mean a reopening of the entire assessment proceeding.<sup>4</sup>

3. In an appeal under Art. 136, the respondent cannot, without filing a cross-objection, attempt to support the judgment on grounds which have been found against him.<sup>5</sup>

### D. Principles relating to appeal by special leave from decisions of tribunals.

(A) 1. The Supreme Court will *not* allow an appeal from the

20. *Aher Raja v. State of Saurashtra*, (1955) 2 S.C.R. 1285.

21. *State of Bihar v. Hiralal*, A. 1960 S.C. 47.

22. *Jumman v. State of Punjab*, A. 1957 S.C. 469 (472).

23. *Cf. Pandurang v. State of Hyderabad*, (1955) 1 S.C.R. 1083; *Nachander v. State of Hyderabad*, (1955) 2 S.C.R. 524 (530).

24. *Ramyed v. State of Bihar*, A. 1957 S.C. 373 (375).

25. *State of Bihar v. Ram Naresh*, A. 1957 S.C. 389 (394) : (1957) S.C.R. 279.

1. *Moseb v. State of W. B.*, A. 1956 S.C. 536 (541).

2. *Mangal Singh v. State of M. B.*, A. 1957 S.C. 199.

3. *Indermant v. I. T. Commr.*, A. 1959 S.C. 82 (89).

4. *Baru Ram v. Prasanni*, A. 1959 S.C. 93.



decision of a quasi-judicial tribunal in the exercise of its extra-ordinary powers under Art. 136, on any of the following grounds :

(i) Where the determination of the tribunal has not been affected materially by an alleged wrong interpretation of any award.<sup>5</sup> Similarly, an award which is within the jurisdiction of the tribunal and based on relevant facts cannot be challenged on abstract questions of law,<sup>6</sup> as in the case of an arbitration tribunal dealing with commercial matters.<sup>7</sup>

(ii) That the tribunal has come to an alleged wrong decision, having the jurisdiction to come to that decision.<sup>8</sup>

(iii) That the award of the tribunal is based on no evidence, when this ground was not urged in the application for special leave. At any rate, when the evidence that was shut out relates to an isolated point which in the opinion of the Tribunal had no bearing on the issue before them, there is no sufficient ground for interference by the Supreme Court.<sup>9</sup>

(iv) That the award has been signed by only two members of the Tribunal though it originally consisted of three persons and the entire hearing had taken place before the three persons, when the statute provided that it was not obligatory upon the Government to fill the vacancy when one of the members 'ceases to be available' at any time during the proceedings.<sup>10</sup>

(v) Where in a proceeding under the Bar Councils Act, the High Court agreed with the Bar Council that the appellant was guilty of professional misconduct, the Supreme Court would not re-examine on the merits this concurrent finding of fact.<sup>11</sup>

(vi) Where the question of jurisdiction is not a pure question of law, but is mingled with a question of facts, a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of a Labour Appellate Tribunal.<sup>12</sup>

(vii) Where the question involved has to be determined on *empirical considerations* as distinguished from objective data.<sup>13</sup>

(B) On the other hand, the Supreme Court has granted special leave to appeal from decisions of tribunals, on the following grounds—

(i) Where the decision of the Tribunal was without jurisdiction, or in excess of its jurisdiction, e.g.,

(a) Where an Election Tribunal allowed a material amendment beyond the time limited in s. 81 of the Representation of the People Act, 1951, for presenting an election petition.<sup>14</sup>

(b) Where the Railway Rates Tribunal entered into the *reasonableness* of terminal charges levied according to the provisions of the Railways Act.<sup>15</sup>

(c) Where an award was passed beyond the time originally fixed by the Government and the *ex post facto* extension of time by Government was *ultra vires*.<sup>16</sup>

5. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459 : (1950-51) C.C. 255.

6. *Kays Construction Co. v. Workmen*, (1958) S.C. [C.A. 362/58].

7. *Niemla Textile Co. v. Punjab Industrial Tribunal*, (1957) S.C.R. 355.

8. *Manak Lal v. Prem Chand*, A. 1957 S.C. 425 (433) : (1957) S.C.R. 575.

9. *United Commercial Bank Ltd. v. U. P. Bank Employees*, A. 1953 S.C. 437.

10. *Indian Bank v. Employees' Union*, A. 1960 S.C. 653.

11. *Harish Chandra v. Triloki*, A. 1957 S.C. 444 (455).

12. *S. S. Light Ry. v. U. D. Sugar Mills*, (1960) S.C. [C.A. 347/57].

13. *Strawboard Manufacturing Co. v. G. Mill Workers*, A. 1953 S.C. 95.

14. *Clerks of C. T. Co. v. C. T. Co.*, A. 1957 S.C. 78 (81).

(ii) Where it ostensibly failed to exercise a patent jurisdiction;<sup>13</sup> or did not perform its duty under the law,<sup>14</sup> or declined to exercise its jurisdiction upon an erroneous view of the law.<sup>14</sup>

(iii) Where the Tribunal misdirected itself upon a material question and proceeded upon a speculative view of things.<sup>14</sup>

(iv) Where a Tribunal acted in violation of the principles of natural justice.<sup>14</sup> e.g.—

(a) Where an Income-Tax Tribunal, in making an assessment, (a) acted not on material but on pure guess and suspicion, (b) did not disclose to the assessee what information had been supplied to it by the Department, (c) did not give to the assessee any opportunity to rebut the material furnished to the Tribunal by the Department, (d) declined to take all the material that the assessee wanted to produce in support of his case.<sup>14</sup>

(b) Where a Sales Tax Officer, disbelieving the returns filed by the assessee, makes an assessment on any figures of gross turnover without giving any basis to justify the adoption of that figure.<sup>15</sup>

(v) Where the order of the Tribunal was vitiated by an apparent error of law.<sup>14</sup>

#### Some instances where the Supreme Court has interfered with the decisions of Industrial Tribunals.

The Supreme Court has, on special leave, set aside the orders of Industrial Tribunals on the following grounds, *inter alia* :

(a) Where the order of the Tribunal was without jurisdiction, e.g.—

(i) Where the Tribunal directed the payment of costs of a party *in advance* by the other party, irrespective of the final result of the proceeding, such order not being warranted by s. 11 (7) of the Industrial Disputes Act.<sup>16</sup>

(ii) Where the dispute which was referred to the Tribunal was not an 'industrial dispute' within the meaning of the Industrial Disputes Act.<sup>17, 18</sup>

(iii) Where the Tribunal made an award on a matter not included in the reference.<sup>19</sup>

(iv) Where compensation was awarded under s. 25E (iii) to workmen of a 'separate establishment'.<sup>20</sup>

(b) Where the award (say, directing payment of bonus) is made on an arbitrary basis,<sup>21, 22</sup> contrary to settled principles,<sup>23</sup> or the principles of natural justice.<sup>2</sup>

13. *Rafkrishna v. Binod*, (1954) S.C.R. 913.

14. *D. C. Works v. Dhrangadhara Municipality*, A. 1959 S.C. 1271 (1276).

15. *Vashist v. Deo Chandra*, (1955) S.C.A. 41.

16. *D. C. Mills v. Commr. of I. T.*, (1952-54) 2 C.C. 497.

17. *Cf. Raghubar v. State of Bihar*, (1958) S.C.A. 852.

18. *Clerks of C. T. Co. v. C. T. Co.*, A. 1957 S.C. 78 (81).

19. *Punjab National Bank v. Industrial Tribunal*, (1959) S.C.R. 220 (231).

20. *Newspapers Ltd. v. State Industrial Tribunal*, (1957) S.C.R. 754 (769).

22. *Calcutta E. S. Corpn. v. C. E. S. Workers' Union*, A. 1959 S.C. 1191.

23. *Associated Cement Co. v. Workmen*, A. 1960 S.C. 56 (62).

24. *Tata Oil Mills v. Its Workmen*, A. 1959 S.C. 1065.

25. *Indian Hume Pipe Co. v. Their Workmen*, A. 1959 S.C. 1081.

1. *Workmen v. Dimakuchi Tea Estate*, (1958) S.C.A. 602.

1a. *Crompton Parkinson v. Its Workmen*, A. 1959 S.C. 1089 (1094).

2. *B. C. P. W. v. Employees*, A. 1959 S.C. 633 (635).



(c) Where the tribunal came to a conclusion without adverting to the evidence before it.<sup>1</sup>

(d) Where a Labour Appellate Tribunal, acting upon a theory of 'social justice' awarded 'bonus' to workers who had contributed to the trading loss of their employers by their own acts of indiscipline and strike.<sup>2</sup>

(e) Where a question of great public importance, e.g., affecting public servants as a class, is involved.<sup>3</sup>

**Some instances where the Supreme Court has interfered with the decisions of the Labour Appellate Tribunal.**

1. Where the Appellate Tribunal had no jurisdiction to receive a complaint under s. 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950, e.g.,—

(i) Where there was no 'discharge' or 'dismissal' within the meaning of s. 22 of the Act, because the employer had, in the circumstances, a right to close his business, which was exercised *bona fide* and the termination of services of the employees was due to such closure.<sup>4</sup>

(ii) Where the decision of the Tribunal was vitiated by an error of law, e.g.,—

Where the order of the Labour Appellate Tribunal, interfering with the decision of the Industrial Tribunal was manifestly erroneous—on a question as to reinstatement;<sup>5</sup> bonus; or suspension.<sup>6</sup>

2. Where the Appellate Tribunal exceeded its jurisdiction to entertain an appeal under s. 7, e.g.,—

Where a Labour Appellate Tribunal interfered with the decision of an Industrial Tribunal in the absence of a substantial question of law,<sup>7,8</sup> or on extraneous considerations.<sup>9</sup>

4. Where a Labour Appellate Tribunal had not directed its mind to the real question to be decided on an application under s. 22 of the Industrial Disputes (Appellate Tribunal) Act and passed an order on the basis of a somewhat irrelevant finding which had resulted in manifest injustice.<sup>10</sup>

**Some instances where the Supreme Court has interfered with the decisions of the Income-Tax Appellate Tribunal.**

1. The Supreme Court has interfered, under Art. 136 with the decision of the Income-Tax Appellate Tribunal where—

(i) The Tribunal made an assessment against the principles of natural justice,—on pure guess and suspicion.<sup>11,12</sup>

3. *Tilaghar Paper Mills v. Their Workmen*, A. 1959 S.C. 1095.

4. *Muir Mills v. Mazdoor Union*, A. 1955 S.C. 170 (176).

5. *Raj Krishna v. Binod*, A. 1954 S.C. 202.

6. *Banaras Ice Factory v. Workmen*, (1957) S.C.R. 143 (151).

7. *Burn & Co. v. Employees*, A. 1957 S.C. 38 (48).

8. *Baroda Borough Municipality v. Workmen*, (1957) S.C.R. 33 (51).

9. *Ranipur Colliery v. Bhuban*, A. 1959 S.C. 833.

10. *H. J. Mills v. Their Employees*, A. 1957 S.C. 376.

11. *Tractors Ltd. v. Sayeed*, A. 1959 S.C. 1196; *E. I. Coal Co. v. Mukherjee*, A. 1959 S.C. 1222; *Shiva Glass Works v. Their Workers*, A. 1959 S.C. 1236.

12. *Muir Mills v. Suti Mills Mazdoor Union*, (1955) 1 S.C.R. 991 (1001).

13. *Rholas Industries v. Brijnandan*, A. 1957 S.C. 1 (6).

14. *Omar Salay v. I. T. Commr.*, A. 1959 S.C. 1238 (1251).

15. *D. C. Mills v. Commr. of I. T.*, (1955) S.C.R. 941.

(ii) The decision of the Tribunal is not supported by any evidence whatever, or shows that the tribunal did not apply its mind to the evidence on the record.<sup>16</sup>

2. On the other hand, the Supreme Court has refused to interfere, under Art. 136—

Where the appellant moved the High Court under s. 66 (2) of the Income-Tax Act, and after the decision of the High Court, dismissing the application had become final, appealed to the Supreme Court under Art. 136 against the order of the Income-Tax Appellate Tribunal, on the same grounds as were taken before the High Court.<sup>16, 17</sup>

#### Some instances where the Supreme Court has interfered with the decisions of Election Tribunals.

(A) The Supreme Court has, under Art. 136, set aside orders of an Election Tribunal on the following grounds, *inter alia* :

- (a) Where the Tribunal acted without jurisdiction, e.g.,
- (i) In allowing an amendment not authorised by s. 83 (3) of the Representation of the People Act, 1951<sup>18</sup> or O. VI, r. 17, C. P. Code.<sup>19</sup>
- (ii) In invalidating the election of a candidate on the ground that a nomination was invalid where the statute did not make it invalid.<sup>20</sup>
- (iii) In rejecting an election petition as time-barred where it was not.<sup>21</sup>
- (b) Where the Tribunal arrived at a finding of fact without any evidence at all, e.g. whether a person had been 'employed for payment' in connection with an election.<sup>22</sup>
- (c) Where the decision of the Tribunal was vitiated with an error on the face of the record, e.g.—

Where an Election Tribunal set aside an election upon an erroneous view of the law, e.g., treating the mandatory provision of s. 33 (1) of the Representation of the People Act, 1950 as a 'technical requirement',<sup>23</sup> or making a wrong application of s. 123 (7) of the Representation of the People Act, 1951.<sup>24</sup>

#### Interference with a finding of fact.

1. When hearing appeals under Art. 136, the Supreme Court does not sit as a Court of further appeal on facts, and does not interfere with findings given on a consideration of the evidence, unless—

- (a) They are perverse or based on surmises and conjectures, not supported by any evidence on record.<sup>25, 26</sup>
- (b) They are based partly upon admissible and partly upon inadmissible evidence.<sup>27</sup>
- (c) They are based upon a view of the facts which cannot be reason-

16. *Govindarajulu v. Commr. of I. T.*, (1958) S.C. [C.A. 41-43/57].

17. *Chinmonlall v. I. T. Commr.*, A. 1960 S.C. 280 (282).

18. *Harish v. Triloki*, (1957) S.C.R. 370 (392, 395-6).

19. *Dinabandhu v. Jadumani*, A. 1954 S.C. 411.

20. *Harinder v. Karnail*, (1957) S.C.R. 208 (213).

21. *Harish v. Triloki*, (1957) S.C.R. 370 (398).

22. *Rattan v. Atma Ram*, (1955) S.C.A. 654.

23. *K. C. Deo v. Raghunath*, (1959) 2 S.C.A. 168.

24. *Lalchand v. Commr. of I. T.*, A. 1959 S.C. 1295 (1298).

25. *Cf. Raghubar v. State of Bihar*, (1958) S.C.R. 37.

1. *Dharangadhara Chemical Works v. State of Saurashtra*, (1956) S.C.R. 152 (162).

2. *Dinabandhu v. Jadumani*, A. 1954 S.C. 411.



ably entertained<sup>24</sup> or, in other words, the conclusions are such that no tribunal of reasonable and unbiassed men could have reached.<sup>25</sup>

(d) The conclusions are such that no person acting judicially and properly instructed as to the relevant law could have reached.<sup>26</sup>

(e) Where the finding is arbitrary or is arrived at in violation of the principles of justice.<sup>27</sup>

(f) Where the Tribunal has spoken in two voices and given inconsistent and conflicting findings.<sup>28</sup>

(g) Where the finding is not based on any legal evidence and is wholly inconsistent with the material on the record;<sup>29</sup> or is based on conjectures.<sup>30, 31</sup>

(h) Where the finding of fact is based on a consideration of material which is irrelevant to the inquiry; or partly on relevant and partly on irrelevant material and it is impossible to say to what extent the mind of the Court was affected by the irrelevant material.<sup>32</sup>

Beyond this, the Supreme Court will not enter into the soundness of the findings made by such a Tribunal.<sup>33</sup>

2. The Court thus refused to review the decision of the Election Tribunal on the following questions—

(a) When the candidature commenced in a particular case.<sup>34</sup>

(b) Whether the improper rejection of a nomination paper materially affected the result of the election.<sup>35</sup>

(c) Whether a particular sum paid at the time or on the eve of election was a donation, an act of charity or an election expense.<sup>36</sup>

3. Similarly, in the case of an Industrial Tribunal, the Court has refused to interfere with findings of fact on the following points, *inter alia*, where the finding was based on the materials on record:

Whether certain employees were 'workmen'.<sup>37</sup>

4. On the other hand, the Court would interfere with a finding of fact arrived at by a Tribunal where it is based on an error of law, e.g.—

(a) Where an Election Tribunal found that a business was a joint family business, acting on the presumption that a new business started by the father is a joint family business (while there was no such presumption in law).<sup>38</sup>

### 'Tribunal'.

1. This term includes not only 'Courts' but also quasi-judicial tribunals which have the 'trappings of a Court'. Broadly speaking, the jurisdiction of the Supreme Court under Art. 136 (1) to entertain appeal by special leave extends to any tribunal against whose decision the Court has the jurisdiction to issue the writs of *certiorari* and *prohibition*.<sup>39</sup>

3. *Jamuna Prasad v. Lachhi Ram*, A. 1954 S.C. 686.

4. *D. C. Mills v. Commr. of I. T.*, (1952-4) 2 C.C. 497: (1955) 1 S.C.R. 941: A. 1955 S.C. 65.

5. *P. S. Mills v. Mazdoor Union*, A. 1957 S.C. 95 (102).

6. *Macropollo v. Macropollo*, A. 1958 S.C. 1012.

7. *Omar Salay v. Commr. of I. T.*, A. 1959 S.C. 1238 (1246).

8. *Dhirajlal v. Commr. of I. T.*, A. 1955 S.C. 271.

9. *Khader v. Munuswami*, (1955) 2 S.C.R. 469 (474).

10. *Surendra v. Dalip*, (1957) S.C.R. 179 (186).

11. *Dharangadhara Chemical Works v. State of Saurashtra*, (1957) S.C.R. 152 (164).

12. *Chattanatha v. Ramachandra*, (1955) 1 S.C.R. 477 (481).

13. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459: (1950-51) S.C. 255.

Thus, under the present Article, the Supreme Court has entertained appeals from—

An Industrial Tribunal constituted under the Industrial Disputes Act, 1947;<sup>14</sup> an Election Tribunal;<sup>15</sup> the High Court determining a case under s. 12 (4) of the Bar Councils Act;<sup>16</sup> Income-Tax Appellate Tribunal;<sup>17</sup> Labour Appellate Tribunal;<sup>18</sup> Custodian-General acting under s. 27 of the Administration of Evacuee Property Act;<sup>19</sup> Authority under the Payment of Wages Act;<sup>20</sup> Special Officer appointed under s. 153A (3) of the Bombay District Municipal Act, 1901.<sup>21</sup>

2. On the other hand,—The word 'tribunal' in Art. 136 excludes 'domestic tribunals' on the ground that they are not created by the State nor do they derive their authority from it.<sup>21</sup> Again, a tribunal would be outside the ambit of Art. 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive functions.<sup>21</sup>

### Appeal to Supreme Court under statutory provisions.

Appeal lies to the Supreme Court from a judgment of the High Court delivered on a reference under s. 66 of the Income-tax Act, on the certificate of the High Court issued under s. 66A (2) of that Act.<sup>22</sup> Where, however, the High Court refuses to issue this certificate, the Supreme Court may grant special leave to appeal, under Art. 136 of Constitution.<sup>23</sup>

**137.** Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or made by it.

Review of judgments or orders by the Supreme Court.

**138.** (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agree-

14. *Muir Mills v. Sull Mills*, (1955) S.C.A. 321.

15. *Rajkrishna v. Binod*, (1954) S.C.R. 913; *Durgashankar v. Raghuraj*, (1955) 1 S.C.R. 267; (1952-4) 2 C.C. 619.

16. *Bhataraju v. Judges of the Madras High Court*, A. 1955 S.C. 223; *Manak Lal v. Prem Chand*, A. 1957 S.C. 425.

17. *D. C. Mills v. Commr. of I. T.*, (1952-4) 2 C.C. 497; (1955) 1 S.C.R. 941.

18. *Cf. Indira Sohanlal v. Custodian*, A. 1956 S.C. 76.

19. *Hira v. Pradhan*, A. 1959 S.C. 1226.

20. *Dhrangdhara Chemical Works v. Dhrangdhara Municipality*, A. 1950 S.C. 1271.

21. *Durgashankar v. Raghuraj*, (1955) 1 S.C.R. 267; (1952-4) 2 C.C. 619.

22. *Cf. G. F. Pension Fund v. Commr. of I. T.*, A. 1955 S.C. 50.

23. *Cf. D. C. Mills v. Commr. of I. T.*, A. 1955 S.C. 65 (68).



ment confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

**139.** Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

Conferment on the Supreme Court of powers to issue certain writs.

**140.** Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

Ancillary powers of Supreme Court.

**141.** The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Law declared by Supreme Court to be binding on all courts.

#### Binding force of Supreme Court decisions.

All Courts in India are bound to follow the decisions of the Supreme Court even though they are contrary to decisions of the House of Lords<sup>24</sup> or of the Privy Council.<sup>25</sup>

But the Supreme Court itself is not bound by its own decisions and is free to depart from a previous decision if the Court is satisfied of its error and its baneful effect on the general interests of the public.<sup>1</sup>

#### Obiter dicta.

Some High Courts have held<sup>2</sup> that *obiter dicta* of the Supreme Court constitute 'law' within the meaning of Art. 141. But even if it were otherwise, according to the ordinary rules relating to precedents, the *obiter dicta* of the supreme tribunal are entitled to considerable weight.<sup>3</sup>

**142.** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that

Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

24. Article 139 shall not apply to the State of Jammu and Kashmir.  
25. *I. T. Commr. v. Shrinibai*, A. 1956 Bom. 586; *Punjabi v. Shamrao*, A. 1955 Nag. 293.

1. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (628).  
2. *Ram Surat v. Ram Mural*, A. 1955 All. 443; *Kaikhassu v. State of Bombay*, A. 1955 Bom. 220.

3. *I. T. Commr. v. Vazir*, A. 1959 S.C. 814 (821).

behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

**143.** (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in . . .<sup>4</sup> the proviso, to article 131, refer a dispute of the kind mentioned in the said *Proviso* to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

#### **Art. 143: Consultative Function of the Supreme Court.**

1. This Article confers upon the President the power to consult the Supreme Court upon any question of public importance as the President may think fit.

2. While under cl. (2), it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon, the Court has, under cl. (1) a discretion in the matter and may, in a proper case, decline to express any opinion on the questions submitted to it.<sup>5</sup>

3. It is for the President to determine what questions should be referred, including a pending Bill; on the other hand, the Supreme Court cannot go beyond the questions referred and discuss other questions because any doubts may have arisen relating to them.<sup>6</sup>

(i) It is neither obligatory upon the Supreme Court to give its opinion under this Article whenever the President makes a reference, nor for the President to act upon the opinion pronounced by the Supreme Court.

(ii) The advisory opinion given under the present Article is not a judgment,<sup>7</sup> and does not, accordingly, furnish a good root of title such as might spring from a judgment of the Supreme Court.<sup>8</sup>

4. The words "clause (i) of" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

5. *Re. Kerala Education Bill*, A. 1958 S.C. 956.

6. In the matter of *Duty on Non-Agricultural Property*, (1946) 49 C.W.N. 9 (F.R.).

7. *In re Allocation of Lands and Buildings*, A. 1943 F.C. 13.

8. *In re Delhi Laws Act*, 1912, (1950-51) C.C. 328 : (1951) S.C.R. 747.



(iii) It is doubtful whether an opinion given under Art. 143 comes within the purview of Art. 141, but the opinion rendered by the Supreme Court in the *Delhi Laws Act*<sup>1</sup> case has been freely referred to and followed by the different High Courts.

Civil and judicial authorities to act in aid of the Supreme Court.

**144.** All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

**145.** (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including,—

- (a) rules as to the persons practising before the Court ;
- (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered ;
- (c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III ;
- (d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134 ;
- (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered ;
- (f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein ;
- (g) rules as to the granting of bail ;
- (h) rules as to stay of proceedings ;
- (i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay ;
- (j) rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five :

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132

consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

**Sub-cl. (3): Cases involving constitutional interpretation.**

1. This clause insists that all constitutional questions should be heard and decided by a Bench of not less than five Judges. Hence, whenever a constitutional question is raised before a smaller Bench, it is bound to refer it to the 'Constitution Bench' unless the question has already been decided by a Bench of five Judges, in which case the question ceases to be 'substantial'.<sup>9</sup>

2. But the splitting up of a case into different stages for hearing (on constitutional and other questions) by different Benches is not repugnant to this or any other provisions of the Constitution.<sup>10</sup>

**146.** (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct:

Officers and servants and the expenses of the Supreme Court.

Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the

9. *Abdul Rahim v. State of Bombay*, A. 1959 S.C. 1315 (1316).

10. *Rao Shiv Bahadur v. State of U. P.*, (1955) 2 S.C.R. 206 (215).



Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

147. In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

#### CHAPTER V.—COMPTROLLER AND AUDITOR-GENERAL OF INDIA

148. (1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule :

Provided that neither the salary of a Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller and Auditor-General shall not be

eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

**149.** The Comptroller and Auditor-General shall perform

Duties and powers of the Comptroller and Auditor-General.

such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Power of Comptroller and Auditor-General to give directions as to accounts.

**150.** The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

**151.** (1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor . . . <sup>11</sup> of the State, who shall cause them to be laid before the Legislature of the State.

<sup>11</sup>. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.



## PART VI

THE STATES<sup>1</sup>

## CHAPTER I.—GENERAL

**152.** In this Part, unless the context otherwise requires, the expression "State" *does not include the State of Jammu and Kashmir.*<sup>2</sup>

Definition.

## CHAPTER II.—THE EXECUTIVE

*The Governor*

**153.** There shall be a Governor for each State:

Governors of States.

*Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more States.*

**Amendment.**—The Proviso, inserted by the **Constitution (Seventh Amendment) Act 1956** now makes it possible for appointing the same person to be a Governor of two or more States, in case any such exigency arises.

**154.** (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Executive power of State.

(2) Nothing in this article shall—

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

## Cl. (1): 'Executive power'.

1. This expression is very wide. It connotes the residue of governmental functions that remain after the legislative and judicial functions are taken away.<sup>3</sup> It includes all acts necessary for the carrying on or supervision of the general administration of the State.<sup>4</sup>

2. The powers of the State Executive are, no doubt, co-extensive with the legislative powers of the State Legislature but this does not mean that in order to enable the Executive to function in respect of

1. The words 'in Part A . . . Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

2. Substituted for the words "means . . . Schedule", by *ibid.*

3. Added by the Constitution (Seventh Amendment) Act, 1956.

any matter, there must be a law of the Legislature already in existence relating to that subject or that the powers of the executive are limited to the carrying out of those laws.<sup>4</sup>

3. The Executive cannot, however, go against the provisions of the Constitution or of any law.<sup>4</sup> [See, further, p. 203, *ante*].

'Officers subordinate to him.'—See under Art. 53 (1), *ante*.

**Cl. (2) (a): Functions conferred by existing law on other authority.**

Though the executive power of the State is, by Art. 154 (1) vested in the Governor it does not operate to transfer to the Governor any function which is conferred by any existing law on any other authority, e.g., the power conferred by s. 7 of the Police Act, 1861 upon certain superior Police Officers to dismiss their subordinates.<sup>5a</sup>

**Cl. (2) (b): Law relating to executive functions.**

When the Legislature confers executive power on any subordinate authority, the Governor can no longer exercise those functions or act in any manner inconsistent with the provisions of such law.<sup>5</sup>

**155.** The Governor of a State shall be appointed by the President by warrant under his hand and seal.

Term of office of Governor.

**156.** (1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office:

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**157.** No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.

Qualifications for appointment as Governor.

**158.** (1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.

4. *Ram Jawaya v. State of Punjab*, A. 1955 S.C. 549.

4a. *Avadh Narain v. Supdt. of Police*, A. 1960 All. 304 (311).

5. *Laxminarayan v. Collector*, A. 1956 M.B. 163 (165).



(2) The Governor shall not hold any other office of profit,

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(3A) *Where the same person is appointed as Governor of two or more States, the emoluments and allowances, payable to the Governor shall be allocated among the States in such proportion as the President may by order determine.*<sup>6</sup>

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.

**159.** Every Governor and every person discharging the

Oath or affirmation by the Governor. functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the seniormost Judge of that Court available, an oath or affirmation in the following form, that is to say—

"I, A. B., do swear in the name of God solemnly affirm that I will

faithfully execute the office of Governor (or discharge the functions of the Governor) of \_\_\_\_\_ (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of \_\_\_\_\_ (name of the State)."

**160.** The President may make such provision as he

Discharge of the functions of the Governor in certain contingencies. thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.

**161.** The Governor of a State shall have the power to

Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

#### Scope of Art. 161.

This Article confers upon the Governor a 'pardoning power' of the

6. Added by the Constitution (Seventh Amendment) Act, 1956.

same nature as enjoyed by the British Crown or the American Sovereign and the scope of the power should be understood accordingly.<sup>7</sup>

#### **Amplitude of power under Art. 161.**

The article, covering as it does the field of mercy and pardon, should be liberally construed.

Further, the words of Article 161 are very wide and do not contain any limitation as to the time at which, the occasion on which, or the circumstances in which the powers conferred by the Article might be exercised. The powers having been conferred by the Constitution and having been unqualified in terms, it is not permissible to the Court to put any restrictions on them.<sup>8</sup>

2. The power conferred by Arts. 72 and 161 are more comprehensive than that under s. 401, Cr. P. C.<sup>9</sup>

3. The power under Arts. 72 and 161 extends to all offences.<sup>1</sup>

#### **Effect of pardon.**

The effect of pardon and amnesty is to absolve the person not only from the penal consequences of the offence but also from civil disqualifications, such as loss of office following from his conviction.<sup>10</sup> But a suspension or remission of the sentence cannot have the latter effect.<sup>11</sup>

#### **Forms in which the pardoning power may be used.**

The article authorises the making of an order—

(a) Granting amnesty or general pardon to convicts or under-trial prisoners,<sup>7</sup> charged with political or non-political offences.<sup>1</sup>

(b) Granting pardon to an accused before, during or after trial,<sup>1,2</sup> even in cases of criminal contempt of Court,<sup>7</sup> with or without condition.<sup>4</sup>

(c) Reprieving or suspending a sentence, with or without condition,<sup>8</sup> during pendency of an appeal.<sup>1, 12</sup>

(d) Remitting a sentence, that is, exempting the accused from undergoing the sentence, or any part of it<sup>3</sup> notwithstanding the decision of the Court imposing the sentence.<sup>2</sup>

#### **Time when the pardoning power can be exercised.**

The power to grant pardon, reprieve, respite or remission of punishment or sentence can be exercised by the Governor either before, during or after trial.<sup>1, 11</sup> Any order issued under Art. 161 must, therefore, to some extent conflict with decision of the Court.<sup>1</sup>

#### **Court's power to interfere, if any.**

1. The power to grant is in essence an executive function to be exercised by the Head of the State after taking into consideration various matters which may be germane for consideration before a Court of law inquiring into the offence.<sup>11</sup> The Court is, accordingly, precluded from examining the wisdom or expediency of exercise of the power in a particular case.<sup>11</sup>

2. An exercise of this executive function during the pendency of judicial proceedings should not be considered to be an interference with

7. *Chennagadu, in re*, I.L.R. (1955) Mad. 92 (105).

8. *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383.

9. *D. I. G. v. Rajaram*, A. 1960 A.P. 259 (261-2).

10. *Balmukand v. K. B.*, (1915) 42 I.A. 133.

11. *Chennugadu, in re*, I.L.R. (1955) Mad. 92.



the course of justice.<sup>12</sup> An order which is *intra vires* the Governor's power cannot be held to be illegal merely because it is in conflict with the order of the Court.<sup>13</sup>

On the other hand—

(a) If the pardoning power is exercised during trial, the Court is free to adjudicate upon the guilt or otherwise of the accused, notwithstanding the pardon.<sup>14</sup> Thus, in a reference under s. 401, Cr. P. C., the Court is free to pronounce upon the validity or correctness of the conviction, notwithstanding the grant of pardon.<sup>15</sup>

(b) Though the Court will not enter into the propriety or sufficiency of the reasons for the exercise of the power in a particular case, the Court may interfere if the Governor exceeds his powers under the Constitution, e.g., if he exercises the power in respect of an offence against a law relating to a matter to which the executive power of the State *does not* extend<sup>16</sup> or in a case of punishment by a Court Martial.

(c) Art. 361 of the Constitution only gives personal protection to the Governor where the action of the Governor is alleged to be against the Constitution or the law, it is competent for the Court to inquire into that question and make a proper order against the Government or its officials even though it will not be possible to make any order against the Governor personally.<sup>17</sup> Thus, if the Court finds that an order of the Governor purported to be issued under Art. 161 has exceeded the constitutional power of the Governor, the Court may issue a writ to the officer who is holding the accused in custody.<sup>18</sup>

(d) The execution of an order made by a Court is an executive function.<sup>14,17</sup> But if an obstruction is caused in its execution, the question whether it was lawful or not can be determined by the Court.<sup>19</sup>

**162.** Subject to the provisions of this Constitution, the executive power of a State shall extend to

Extent of executive  
power of State.

the matters with respect to which the  
Legislature of the State has power to make  
laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

### *Council of Ministers*

**163.** (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his

Council of Minis-  
ters to aid and ad-  
vise Governor.

functions or any of them in his discretion.

12. *Chennungodu*, in re, I.L.R. (1955) Mad. 92 (114).

13. *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383.

14-17. *Saraswathi v. State of Kerala*, A. 1957 Ker. 102.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

#### Art. 163: Council of Ministers and Governor.

1. The only difference between Art. 74 (1) and Art. 163 (1) is that the latter speaks of 'any functions required by the Constitution to be exercised by the Governor in his discretion'. But the only instances of functions required by the Constitution to be exercised by a Governor in his discretion are—the case of the Governor of Assam under Paras. 9 and 18 of the Sixth Schedule; and the function of a Governor appointed to be Administrator of a Union Territory, under Art. 239 (2). There is no other matter in respect of which a Governor may, under the Constitution, act in his discretion.<sup>18</sup> The expression 'in his discretion' in Art. 166 (3) should also be read accordingly.<sup>19</sup>

2. Unless a particular Article expressly so provides, an obligation of the Governor to act 'in his discretion' cannot be inferred by implication. Art. 163 makes it quite clear that except in cases where the Governor 'is required to act in his discretion', he is to act on the advice of ministers.<sup>20</sup> Thus, Art. 171 does not state that in making the nominations, the Governor is to act in his discretion. So, it must be presumed that in making the nomination, the Governor had acted on the advice of his council of ministers.<sup>21</sup>

**164.** (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:

Other provisions as to Ministers.

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

18. *Varadaraja v. State of T. C.*, A. 1953 T.C. 140.

19. *Asad v. State of Assam*, A. 1958 A.P. 619 (623).

20. *Bimanchandra v. Governor*, W. B., A. 1952 Cal. 799.



(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

**Art. 164: Appointment of Ministers.**

The Chief Minister is appointed by the Governor. The choice of the Governor is not limited by anything in the Constitution, and he may even choose a person who is not at the time of appointment a member of the Legislature. The only limitations are—(a) if the person is selected from outside the Legislature, he shall cease to be a Minister unless he becomes a member of the Legislature within six months of the appointment [Art. 164 (4)]. There is, however, no restriction that the Chief Minister or any other Minister must be a member of the lower House, *i.e.*, the Legislative Assembly. Again, he may become a member of the Legislative Council by nomination of the Governor under Art. 171 (3) (c). In the result, there is no constitutional bar to the Governor appointing a person as Chief Minister who is not an elected person.<sup>21</sup> (b) The only effective check against this is that the Ministry shall fall if it fails to command a majority in the Legislative Assembly [Art. 164 (2)]. But, if the Legislature is not in session, a Minister may carry on without being sure of such majority, so long as the Legislature is not summoned.

Whatever be the *political* sanction, however, the Courts have no power to interfere when a Governor calls a person to be the Chief Minister and to form a Ministry.<sup>22</sup>

*The Advocate-General for the State*

**165.** (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

**Art. 165 (1): Appointment of Advocate-General.**

The Governor's order, appointing a person as Advocate-General, purporting to be made under Art. 165, is not questionable in a Court, by reason of Art. 361 (1). But *quo warranto* lies against the person appointed, to question the legality of his appointment, for there is no prohibition, express or implied, in the Constitution against the Court

21. *Cf. In re Ramamoorthi*, A. 1953 Mad. 94. [The case of Sri Rajagopalachari becoming Chief Minister of Madras].

in this matter.<sup>22</sup> The Governor is not a necessary party to such proceeding.<sup>23</sup>

**'Qualified to be appointed a Judge of a High Court'.**

Art. 217 (2) prescribes the qualifications for appointment as a Judge of the High Court, and cl. (1) of Art. 217 says that every Judge of a High Court 'shall hold office until he attains the age of sixty years'.

The Nagpur High Court has held<sup>24</sup> that the provision in cl. (1) of Art. 217 does not prescribe the qualifications for appointment as a Judge of the High Court but prescribes the 'duration' of the office of a High Court Judge, and, therefore, while cl. (2) of Art. 217 applies to the appointment of an Advocate-General, cl. (1) does not, since the specific provision in Art. 165 (3) says that an Advocate-General shall 'hold office during the pleasure of the Governor', without any age limit. Hence, there is no bar to a person being appointed Advocate-General after the age of sixty years or to his continuing in that office after attaining the age of sixty years. According to this view, therefore, a retired High Court Judge may be appointed Advocate-General.

*Conduct of Government Business*

Conduct of business of the Government of a State.

**166.** (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

**Cl. (1): Formality for expression of 'executive action'.**

1. This clause requires that all executive action of a State Government shall be expressed to be taken in the name of the Governor. The Constitution, however, does not require any particular formula of words for compliance with Art. 166 (1). What the Court has to see is whether the *substance* of its requirements has been complied with.<sup>25</sup>

Thus, there is a substantial compliance with the clause—

(i) Where a notification is signed by a Secretary 'by order of the Governor'.<sup>26</sup>

(ii) An order signed by the Chief Secretary 'on behalf of the Government' has been held to be in *substantial compliance* with Art. 166, even though it is not expressed to have been made in the name of the Governor.<sup>27</sup>

22. *Karkare v. Shevde*, A. 1952 Nag. 330.

23. *State of Bombay v. Purushottam*, (1952) S.C.R. 674 (678).

24. *John v. State of T. C.*, (1955) 1 S.C.R. 1011; (1952-4) 2 C.C. 600 (604).



On the other hand, there is no compliance with this clause—

Where a Secretary to the Government issues a letter without mentioning the name of the Governor at all.<sup>25</sup>

2. Again, cl. (1) does not prescribe how an executive action of the Government is to be *performed*; it only prescribes the *mode* in which such act is to be *expressed*. While cl. (1) relates to the mode of *expression*, cl. (2) lays down the ways in which the order is to be *authenticated*. Cl. (1) is *directory* and not *mandatory* in character. Hence, failure to comply with Art. 166 (1) does not nullify the order but only takes away the constitutional immunity from proof. The order would be upheld if the State can *otherwise* prove that the order was, in fact, made by the Governor.<sup>1</sup>

### 'Executive Action'.

1. Cl. (1) is confined to cases where the executive action is required to be expressed in the shape of a formal order or notification or any other instrument.<sup>1</sup> Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate Minister or officer. If every executive decision has to be given a formal expression the whole governmental machinery will be brought to a standstill. But when executive decision affects an outsider or is required to be officially notified or communicated, it should be normally expressed in the form mentioned in Art. 166 (1).<sup>2</sup>

2. Noting by a Minister on the file does not constitute action of the Government. It is the order of the Governor, duly authenticated under this article, that constitutes the order of the Government.<sup>3</sup> A Minister cannot directly issue an order of the Government.<sup>4</sup>

3. The filing of the memorandum of appeal against an order of acquittal is not executive action within the meaning of Art. 166 (1) and does not, therefore, require the signature of the Governor.<sup>5</sup>

But the expression is wide enough to include—

(i) Orders which embody quasi-judicial decisions taken by Government.<sup>6</sup>

(ii) An order of sanction for prosecution.<sup>7</sup>

### Cl. (2): 'Shall be authenticated'.

Where the Rules made by the Governor lay down that orders made and executed by the Governor shall be authenticated by the signature of a Secretary, no note or order of a Minister which is not so authenticated, can operate as an order of the Government of the State.<sup>8,9</sup>

### Bar to Judicial enquiry.

1. The validity of an order or instrument which is expressed in the name of the Governor (according to clause (1)), and is duly authenticated according to rules made by the Governor on this behalf, the order or instrument shall not be called in question in any Court on the ground that it is *not made or executed by the Governor*.<sup>1</sup> Thus, it is the signature of the Secretary duly authorised by the Rules which

25. *Krishna v. State*, A. 1960 Orissa 37.

1. *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (624, 631).

2. *Pioneer Motors v. Mafed*, A. 1957 Mad. 48 (59).

3. *State of Hyderabad v. Ahmed*, A. 1953 Hyd. 59.

4. *Jayarama Iyer, in re*, A. 1958 A.P. 643 (645).

5. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (243).

6. *Pioneer Motors v. Mafed*, A. 1957 Mad. 48.

7. *Cf. Ghais Mal v. State of Delhi*, (1958) S.C. [unrep.].

signifies the consent of the Governor, and the acceptance of the advice rendered by the Minister.<sup>8</sup>

2. This provision is, however, subject to the following limitations—

(a) It does not oust the jurisdiction of the Court to examine the validity of the order or instrument on any other ground, e.g.—

That a condition precedent for the making of the order has not been fulfilled.<sup>9-11</sup> Thus, when the satisfaction of a particular authority is necessary under the law to make the order, the Court can enquire whether the order was based on such satisfaction.<sup>12</sup> Of course, in the normal case, a recital in the order to this effect will raise a presumption that the necessary condition has been fulfilled, and throw a difficult onus on the person who wants to challenge the validity of the order; but the Court is not powerless to determine the validity of the order, on taking proper evidence.<sup>9</sup> But where the liberty of the subject is concerned, the Court may not act upon such a presumption.<sup>11</sup>

(b) Strict compliance with the requirements of Art. 166 (1) gives immunity to the order that it cannot be challenged in a Court of law on the ground that it is an order of the Governor. If, therefore, the requirements of the Article are not complied with, the resulting immunity cannot be claimed by the State, but this will not nullify the order itself, if it appears from other materials that such a decision was in fact taken by the Government.<sup>12</sup> Thus,—

(f) Where an order is duly signed by the officer authorised by the Rules made by the Governor under Art. 166 (2), but the order was not expressed to be made in the name of the Governor, affidavit to the effect that the matter had been placed before the Government was received to hold that the order was that of the Government of Bombay.<sup>12</sup>

But the order cannot be saved where it is not duly authenticated and it is established or conceded that it was not made or concurred in by the competent authority.<sup>12</sup>

### Cl. (3): Rules of Business.

1. The satisfaction of the Government, required by s. 3 of the Preventive Detention Act, must be the satisfaction of the Minister-in-charge and not that of the Secretary. The Secretary cannot exercise that power without reference to the Minister.<sup>14</sup>

Sinha J. of the Calcutta High Court<sup>15</sup> has held that the Rules of Business framed under Art. 166 (3) may authorise a Minister to delegate to the Secretary or other officer of his Department, any functions including statutory functions, by making 'Standing Orders'. It is thus possible for the Minister to delegate the function of issuing orders of acquisition, after being satisfied as to the existence of certain conditions, which according to the relevant enactment, is to be a satisfaction of the State Government.<sup>12, 16</sup>

2. Conversely, where a statute vests a power in the Chief Secretary, an order of the Chief Minister, without the concurrence of the

8. *Pioneer Motors v. Majeed*, A. 1957 Mad. 48 (57).

9. *King-Emp. v. Sibnath*, (1950) 50 C.W.N. 25 (32): A. 1945 P.C. 156.

10. *Shombhu v. B. L. Cotton Mills*, A. 1959 Cal. 552 (556).

11. *Shyamagha v. State*, A. 1952 Orissa 200.

12. *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (625, 633).

13. *Cf. Gheis Mal v. State of Delhi*, (1958) S.C. [unrep.].

14. *State v. Somnath*, A. 1953 Orissa 33 (38); *Shyamagha v. State*, A. 1952 Orissa 200.

15. *Bejoy Luxmi Cotton Mills v. State of W. B.*, A. 1960 Cal. 113.

16. *Muralidhar v. State of A. P.*, A. 1950 A.P. 437 (441).



Chief Secretary cannot be valid, even though the order of the Chief Minister is duly authenticated by another Secretary.

3. There is no requirement to publish the Rules framed under Art. 166 (3).<sup>17</sup>

#### Whether statutory and quasi-judicial duties can be delegated.

1. It has now been settled by the Supreme Court<sup>18</sup> that even the functions or duties which are vested in a State Government by a statute may be allocated to Ministers by the Rules of Business framed under Article 166 (3). It has been pointed out that when a function is vested by a statute in the State Government the statutory provision has been interpreted with the aid of the General Clauses Act. The General Clauses Act, 1897 defines a State Government to mean a Governor [section 360 (b)]. A statutory function of the State Government thus becomes a function of the Governor, and the business of State Government under Article 166 (3) includes such statutory business. It is, therefore, competent for the Governor to allocate such statutory functions (including matters relating to his subjective satisfaction)<sup>19</sup> to the Ministers by making rules under Article 166 (3).<sup>18</sup>

2. Whether there can be a further delegation by the Minister to the officers subordinate to him depend upon the provisions of the rules of the business. If the rules enabling the Minister in-charge of a particular department to arrange for the disposal of cases before him by means of standing orders and the statutory functions are included within such enabling provision, they can be delegated by the Minister to his subordinate officers.<sup>19</sup>

3. But if the rules do not specifically authorise such delegation, a delegation of statutory function by the Minister to his Secretary would be invalid.<sup>20</sup>

4. Quasi-judicial functions vested in the State Government can also be similarly allocated provided those rules conform to the principles of judicial procedure.<sup>21</sup> Thus, if the statute confers upon a party a right of *personal hearing* before the State Government, the Rules of Business cannot provide for the delegation of the function of hearing to a Secretary. In such a case the Minister who is to decide must also hear the party.<sup>22</sup>

#### 167. It shall be the duty of the Chief

Duties of Chief Minister of each State—

Minister as respects the furnishing of information to Governor, etc.

(a) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation ;

(b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for ; and

(c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

17. *Muralidhar v. State of A. P.*, A. 1959 A.P. 437 (41).

18. *Nagaseewara v. APSTRC*, A. 1959 S.C. 308 (325).

19. *Shambhu v. B. L. Cotton Mills*, A. 1959 Cal. 552 (556).

### CHAPTER III.—THE STATE LEGISLATURE GENERAL

**168.** (1) For every State there shall be a Legislature which shall consist of the Governor, and  
 Constitution of Legislatures in States. (a) in the States of *Andhra Pradesh*<sup>1</sup>,  
*Bihar*, *Bombay*<sup>2</sup>, *Madhya Pradesh*<sup>4</sup>,  
*Madras*, *Mysore*<sup>3</sup>, *Punjab*, *Uttar Pradesh* and *West Bengal*, two Houses ;  
 (b) in other States<sup>3</sup>, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

**Madhya Pradesh.**—By reason of s. 8 (2) of the Constitution (Seventh Amendment) Act, 1956, Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by the President.<sup>4</sup> So long as such notification is not made laws made by the unicameral Legislature are quite valid.<sup>5</sup>

**169.** (1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council  
 Abolition or creation of Legislative Councils in States. or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

**170.**<sup>5</sup> (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

Composition of the Legislative Assemblies.

1. Inserted by the Legislative Councils Act, 1957.
2. The new State of Gujarat formed out of Bombay shall have one House.
3. Inserted by the Constitution (Seventh Amendment) Act, 1956.
4. *Ramdas v. State*, A. 1959 M.P. 353 (355).
5. Substituted by the Constitution (Seventh Amendment) Act, 1956.



(2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

*Explanation.*—In this clause, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine :

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

**171.** (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-third of the total number of members in the Legislative Assembly of that State:

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(3) Of the total number of members of the Legislative Council of a State—

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify ;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university ;

6. Substituted for 'one-fourth' by the Constitution (Seventh Amendment) Act, 1956.

- (c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament ;
- (d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly ;
- (e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art, co-operative movement and social service.

**Amendment.**—In cl. (1), the word 'one-fourth' has been substituted by the word 'one-third', by the Constitution (Seventh Amendment) Act, 1956.

**Object of Amendment.**—In the Statement of Objects and Reasons of the Amendment Bill it was explained that in the case of the smaller States, the  $\frac{1}{4}$  ratio caused difficulties in the matter of representation in the Legislative Council; hence, the maximum has been raised by making its strength  $\frac{1}{3}$  of that of the Assembly.

#### Cl. (e): No right to challenge the nomination under Art. 226.

1. The nomination of a member by the Governor under the present sub-cl. and cl. (5) does not infringe the personal right of any elected member of the Legislative Assembly even in an indirect manner so as to entitle him to sustain an application for the issue of a writ of *certiorari* to quash the nomination made by the Governor.<sup>7</sup>

2. For the same reason, *Quo Warranto* does not lie against a nominated person so long as the notification making the nominations stands.<sup>8</sup>

7. In re Ramamoorthi, (1952 II M.L.J. 671.

8. *Bimanachandra v. Dr. H. C. Mookherjee*, (1952) 56 C.W.N. 651.



**172.** (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly :

Duration of State Legislatures. Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Qualification for membership of the State Legislature. **173.** A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

(a) is a citizen of India ;

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age ; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

#### Effect of contravention.

The election of a person who is lacking in any of the above qualifications is void,<sup>9</sup> even though the Returning Officer accepted his nomination papers.<sup>10</sup>

<sup>11</sup>[**174.** (1) *The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.*

(2) *The Governor may from time to time—*

(a) *prorogue the House or either House ;*

(b) *dissolve the Legislative Assembly.]*

9. Cf. *Jagadananda v. Rabindra*, A. 1958 Cal. 533 (535).

10. *Mangal Sain v. Shanno*, A. 1959 Panj. 175.

11. Substituted by the Constitution (First Amendment) Act, 1951 s. 8, for the original articles.

**181.** (1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker,

The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they apply in relation

to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

**182.** The Legislative Council of every State having such Council shall, as soon as may be, choose

The Chairman and Deputy Chairman of the Legislative Council.

two members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member

to be Chairman or Deputy Chairman, as the case may be.

**183.** A member holding office as Chairman or Deputy Chairman of a Legislative Council—

Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.

(a) shall vacate his office if he ceases to be a member of the Council ;

(b) may at any time by writing under his hand addressed, if such member is the Chairman, to

the Deputy Chairman, and if such member is the Deputy Chairman, to the Chairman, resign his office ; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.



**184.** (1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

**185.** (1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

**186.** There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

**187.** (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

Secretariat of State Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

### *Conduct of Business*

**188.** Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation  
by members.

#### **Art. 188: Consequence of failure to take oath.**

The penalty for refusal to take oath is prescribed in Art. 193. It does not *ipso facto* render the seat vacant. Hence, an application for *Quo Warranto* also does not lie on the ground that a member has not taken the oath and is not, accordingly, entitled to be a member.<sup>15</sup>

**189.** (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

Voting in Houses,  
power of Houses to  
act notwithstanding  
vacancies and quo-  
rum.

The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth



of the total number of members of the House, whichever is greater.

(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

### *Disqualifications of Members*

**190.** (1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

(3) If a member of a House of the Legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191 ; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant :

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

**Comments.**—See under Art. 101, *ante*.

**191.** (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

*Disqualifications for membership.* (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the

Legislature of the State by law not to disqualify its holder ;

- (b) if he is of unsound mind and stands so declared by a competent court ;
- (c) if he is an undischarged insolvent ;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State ;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

#### 'Office of profit'.

1. In order to attract Art. 102 (1) (a) [*ante*, p. 223], or Art. 191 (1) (a), the person must hold an 'office' and that office must be an 'office of profit'.

2. 'Office' means a position or place to which certain duties are attached, which, in the present context, means duties of a public character.<sup>16,17</sup>

3. An 'office of profit' is an office which is capable of yielding a profit<sup>18</sup> or pecuniary gain.<sup>19</sup> If emoluments are attached to the office, it does not cease to be an office of profit if the holder does not actually receive the emoluments.<sup>16</sup> On the other hand, if a profit does actually accrue from an office, it is an 'office of profit', no matter how it accrues.<sup>16</sup> Thus, the office of an Oath Commissioner, who receives fees for his services, is an office of profit even though he receives no salary from the Government.<sup>19</sup>

4. 'Profit' means any pecuniary gain. The amount of such profit is immaterial for the present purpose; but fees to reimburse out-of-pocket expenses do not constitute profit for the present purpose.<sup>16</sup>

5. It need not be a payment in money. Where lands are allotted to the officer by way of remuneration for services rendered or he is authorised to deduct his remuneration from the Government revenue collected by him, the office held by him is an 'office of profit'.<sup>17</sup>

#### 'Under the Government'.

1. In order to constitute a disqualification under Art. 102 (1) (a) or 191 (1) (a), the office of profit must be held under the Government. Employees of a statutory body corporate cannot be said to be holding their office under the Government where they are neither appointed

16. *Deorao v. Keshav*, (1958) 60 Bom. L.R. 217. [According to this case, it is not necessary to constitute an office that the post must have an existence independent of the person who holds it,—a proposition which runs counter to that laid down in *V. G. W. Ry. v. Bater*, (1922) A.C. 1.].

17. *Cf. Ramappa v. Sangappa*, A. 1958 S.C. 937.

18. *Ravanna v. Kaggeerappa*, A. 1954 S.C. 653 (657).

19. *Abdul Shakoor v. Rikhab Chand*, A. 1958 S.C. 52 (55).



nor are removable by the Government nor are they paid out of the revenues of the Government,<sup>19</sup> even though the corporation itself may be under the control of the Government.<sup>19</sup>

2. 'Government' in this context includes all the three branches of Government,—legislative, executive and judicial, so that persons appointed to the Secretariat of the Legislature are also officers under the Government.<sup>20</sup> But an elected member of the Legislative Council does not hold an office *under* the State Government, for his appointment or removal does not lie within the power of the State Government.<sup>21</sup>

3. It is the power of appointment and removal and not the source of the remuneration paid that constitutes the test of an office being held under the Government or not.<sup>22</sup>

4. Where an *appointment* to an office is made by the Government and the person holds the office by reason of such appointment, it is immaterial for the present purpose that Government has no option but to appoint a particular person (e.g., the heir of a village *patel*,<sup>23</sup> or of a Sarbarakar in Orissa).<sup>24</sup> Similarly, where Government has the power to *dismiss* an officer it is immaterial for the present that such dismissal is not at the pleasure of the Government but has to be made under statutory grounds.<sup>17</sup>

For the same reason, where a person, in fact, holds an office by virtue of an appointment by the Government, any defect in the order of appointment is immaterial for the purpose of determining whether he is 'holding' an office of profit.<sup>25</sup>

**192.** (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

Decision on questions as to disqualifications of members.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

#### CL. (1): 'Has become'.

These words indicate that the disqualification which can be referred to the Governor under the present Article is a disqualification arising subsequent to the election and not existing at the time of the election.

#### CL. (2): 'Shall act according to such opinion'.

It would appear from these words that the Government has no discretion to decide such question contrary to the opinion of the Election Commission. Thus, when an Election Tribunal has adjudged a member to be guilty of a corrupt practice, the Governor cannot legitimately refuse to act according to that decision, except perhaps on the ground that the Tribunal was not validly constituted.<sup>24</sup>

20. *Holl Lal v. Raj Bahadur*, A. 1959 Raj. 227 (230).

21. *Ramnarain v. Ramchandra*, (1957) 60 Bom. L.R. 770 (773).

22. *Raghunath v. Kishore*, A. 1958 Orissa 260 (264).

23. *Holl Lal v. Raj Bahadur*, A. 1959 Raj. 227 (230).

24. Cf. *Ibrahim v. Election Tribunal*, A. 1957 All. 292 (294).

**193.** If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

*Powers, Privileges and Immunities of State Legislatures and their Members*

**194.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof. (2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

**Art. 194: Privileges of the Legislature.**—See p. 186, *ante*, under Art. 105.

**'Subject to the Constitution'.**

1. Art. 194 (1) is 'subject to the Constitution', i.e., subject to the provisions of Arts. 208 and 211. Hence, in the exercise of his freedom of speech, a member cannot raise a discussion as to the conduct of a

25. *Sharma v. Sri Krishna*, A. 1950 S.C. 395 (409).



Supreme Court or High Court Judge; which is prohibited by Art. 211.<sup>22</sup> [See under Art. 105, ante].

2. The restrictive words at the beginning of cl. (1) are not, however, used in cl. (2), which means that there is *absolute* immunity so far as liability before a Court of law is concerned. In the result, no member can be held liable before a Court for contempt for having violated Art. 211 or for breach of any of the Rules of the Legislature.<sup>23</sup> The remedy for such violation lies in the hands of the Speaker or the Legislature itself.<sup>1</sup>

### Scope of Cl. (2).

'Proceedings' in cl. (2) include not only speeches but also motions, questions etc. as form part of the proceedings of the House.<sup>2</sup> But questions which are disallowed never form part of the proceedings.<sup>3</sup>

### Scope of Cl. (3).

1. This clause provides that in the absence of any legislation by the State Legislature, the powers, privileges etc. by a House of the Legislature or any Committee thereof shall be the same as those of the House of Commons at the commencement of the Constitution.<sup>4</sup> It thus gives the power to punish for contempt either a member<sup>5</sup> or a stranger<sup>6</sup> in like cases as would have enabled the House of Commons to act in such matters. Similarly, a House has the power to prohibit even a faithful report of its proceedings.<sup>7</sup>

2. Clauses (1), (2) and (3) of Art. 194 are mutually exclusive, so that if a matter relates to the publication of the proceedings of the Legislature but is not covered by cl. (2), immunity for it cannot be claimed under cl. (3).<sup>8</sup>

3. It has, accordingly, been held by the Calcutta High Court<sup>9</sup> that the principle laid down in the English decision in *Wason v. Walter*,<sup>10</sup> which protects unauthorised but fair or faithful publication of the proceedings of a House of the Legislature, does not apply in India. Cl. (2) of the present Article of our Constitution protects only authorised publication and there is no exception in our law of defamation contained in the Penal Code in favour of publication of the proceedings of the Legislature.<sup>11</sup>

### Speaker's jurisdiction to take steps for contempt.

1. Though the normal procedure for a House to take cognisance of an alleged contempt is by a regular contempt to the House by a member, there is nothing to prevent the Speaker, as the representative of the dignity of the House, to take cognisance of a contempt committed in the House itself or outside and then to set the House and its machineries for an appropriate action against the offender.<sup>12</sup>

2. At any rate, the Court has no jurisdiction to interfere with a writ to summon a person for appearing before the Privileges Committee, on the ground that there was no resolution authorising the Speaker to summon such person.<sup>13</sup> The Court cannot interfere with any action taken for contempt unless the Legislature or its duly authorised officer is seeking to assert a privilege not known to the

1. *Surendra v. Nabakrishna*, A. 1958 Orissa 168 (172, 176).

2. *Khin Maung v. Au Eu Wa*, A. 1938 Rang. 425.

3. *Jatish v. Harisadhan*, (1956) 60 C.W.N. 971.

4. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407); see also p. 323, ante.

5. *Raj Narain v. Atmaram*, A. 1954 All. 319.

6. *Jatish v. Harisadhan*, (1956) 60 C.W.N. 971 (977).

7. *Suresh v. Punll*, (1951) 55 C.W.N. 745.

law of Parliament.<sup>8</sup> Once a privilege is held to exist, it is for the House to judge the occasion and its manner of exercise. The Court cannot interfere with an *erroneous* decision by the House or its Speaker in respect of a breach of its privilege.<sup>9</sup>

**Whether warrant issued by a State Legislature to punish for contempt can run beyond the territory of the State.**

The Bombay High Court<sup>8</sup> has held that a warrant issued for the arrest of a person for the purpose of answering a charge of contempt, by a House of the Legislature of a State may run and be effective beyond the territory of that State inasmuch as the very object of the privileges of a Legislature would be defeated if it is denied execution outside the boundaries of the State, and, further, because there is no difference in the provisions of Arts. 105 (3) and 194 (3) in this respect.

This view, it is submitted, overlooks the basic fact that *our* Constitution is federal and the limitations to the powers of all the organs of a State follow from that basic fact. That is why express provision is required in Art. 261 for the recognition of all the public acts of a State,—executive, legislative and judicial, outside the territory of that State. A Legislature is constituted under the Constitution for the purposes of legislation and if that legislative power cannot extend beyond the boundaries of the State [Art. 245 (1)], it is difficult to imagine that the powers ancillary thereto shall extend beyond that, in the absence of express constitutional provision. Further, the judgment does not take into account the situation in other federal countries.

As matters stand, it is not possible to give effect to the warrant of one State in another State unless the latter State, in pursuance of an inter-State agreement, enacts legislation to this effect.

**195.** Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

Salaries and allowances of members.

### *Legislative Procedure*

**196.** (1) Subject to the provisions of articles 198 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

Provisions as to introduction and passing of Bills.

(2) Subject to the provisions of articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless

8. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (413); *Harendra v. Dev Kanta*, A. 1958 Assam 160.

9. *Homi Mistry v. Hafsul*, (1958) 60 Bom. L.R. 270 (291).



it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

**197.** (1) If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

Restriction on powers of Legislative Council as to Bills other than Money Bills.

(a) the Bill is rejected by the Council ;  
or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it ; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree ;  
the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council ; or

(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it ; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree ;  
the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

**198.** (1) A Money Bill shall not be introduced in a Legislative Council.

Special procedure  
in respect of Money  
Bills.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council, for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

**199.** (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

Definition of  
"Money Bills".

- (a) the imposition, abolition, remission, alteration or regulation of any tax ;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State ;
- (c) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund ;
- (d) the appropriation of moneys out of the Consolidated Fund of the State ;



- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure ;
- (f) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money ; or
- (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under article 198, and when it is presented to the Governor for assent under article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

**200.** When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by  
 Assent to Bills. both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom :

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any

Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that court is by this Constitution designed to fill.

**'Reservation for consideration of the President'.**

Art. 200 does not contemplate that the Governor shall first give his assent, and, when the bill has become a full-fledged law, reserve it for the consideration of the President. Reservation is an alternative to his giving or refusing assent to the bill. Indeed, in matters where reservation is compulsory, the Governor is prohibited from giving his assent.<sup>10</sup>

**Proof of assent.**

1. When an Act is published in the Official Gazette, showing that the assent of the head of the State was given on a particular date, the burden to prove that it did not receive his assent on that date lies on the person who disputed the fact.<sup>11</sup>

2. The mere fact that the head of the State was not present in the capital on a particular date is not enough to prove that his assent could not be given on that date, as there are other methods of obtaining his assent, e.g., by telegram, telephone or the like.<sup>12</sup>

3. 'Declaration' of assent means nothing more than a public notification that assent has been given.<sup>13</sup>

**Proviso 2: 'Derogate from the powers of the High Court'.**

These words are qualified by the words "which endangers the position of that Court which by the Constitution it is designed to fill". Hence, if a Bill merely seeks to affect the rights of the parties in a case pending before the High Court without endangering the constitutional position of the High Court, it need not be reserved under this Proviso.<sup>14</sup>

**201.** When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom :

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.

10. *State of Bihar v. Kameshwar, A.* 1952 S.C. 252 (265).

11. *Hari Singh v. State of Rajasthan, A.* 1954 Raj. 117.

12. *Gajapati v. State of Orissa, A.* 1953 Orissa 185.

13. *Prem Narain v. State of U. P., A.* 1960 All. 205 (207).



*Procedure in Financial Matters*

**202.** (1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement."

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State ; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State ;

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(a) the emoluments and allowances of the Governor and other expenditure relating to his office ;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council ;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court ;

(e) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal ;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

**203.** (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

**Cls. (2)-(3): 'Demands'.**

These clauses require that every 'demand' shall be recommended by the Governor and separately put to the vote of the Assembly. The Article makes no reference to the items included in each demand or to the purpose for which each item is required.<sup>14</sup>

**204.** (1) As soon as may be after the grants under Appropriation Bills, article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

**Effects of the Appropriation Act.**

1. The Appropriation Act gives legal sanction to the grants voted by the Legislature. After the Act is passed, the limitation of expenditure under a head is to be determined solely with reference to the Schedule of the Act.<sup>15</sup>

2. Money appropriated towards a particular head is to be spent on that head only unless the Schedule is amended by an appropriate law, or rule having the force of law, consistent with the Constitution.<sup>16</sup>

3. But, any expenditure incurred under any of the heads mentioned in the Schedule and within the limits specified therein cannot be questioned as unconstitutional.<sup>17</sup>

14. *Piarelal v. State of M. P.*, A. 1955 Nag. 11.



**205. (1) The Governor shall—**

Supplementary, additional or excess grants.

(a) if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service

for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

**Applicability of Art. 205.**

1. The provision in Art. 205 can be availed of only if the money already voted in the Budget for a particular purpose is insufficient or when a need arises after the Budget was passed for incurring a particular expenditure or when some new service not contemplated in the Budget has been started.<sup>15</sup>

2. Hence, where the Memorandum accompanying a Budget clearly states that a need has already arisen and a new service is contemplated, a provision for such expenditure has to be made in the Budget itself.<sup>16</sup>

**206. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power—**

Votes on account, votes of credit and exceptional grants.

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such

<sup>15</sup> *Plarelal v. State of M. P.*, A. 1955 Nag. 11.

grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure ;

(b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

**207.** (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council :

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.



*Procedure Generally*

**208.** (1) A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of Procedure.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

**Arts. 208 and 21**

Rules made under Art. 208 constitute 'law' within the meaning of Art. 21.<sup>16</sup>

**209.** The Legislature of a State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and, if and so far as any provision of any law so made is inconsistent with any rule made by the House or either House of the Legislature of the State under clause (1) or article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of that article, such provision shall prevail.

Regulation by law of procedure in the Legislature of the State in relation to financial business.

**210.** (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English :

Language to be used in the Legislature.

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such,

16. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (411).

as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

**211.** No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

*Restriction on discussion in the Legislature.*

**212.** (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

*Courts not to inquire into proceedings of the Legislature.*

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

**Cl. (1): Courts not to inquire into proceedings of the Legislature.**  
See p. 235, *ante*, under Art. 122.

#### CHAPTER IV.—LEGISLATIVE POWER OF THE GOVERNOR

**213.** (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

- (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature ; or
- (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President ; or

*Power of Governor to promulgate Ordinances during recess of Legislature.*



(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

*Explanation.*—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, and Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

#### **Arts. 213: Ordinances making power of Governor.**

##### **CL. (1): 'Is satisfied'.**

1. As in the case of an Ordinance made by the President the Courts cannot question the validity of an Ordinance made by a Governor on the ground that there were no sufficient reasons for promulgating an Ordinance<sup>17</sup> or that it was made *mala fide*, e.g., to circumvent judicial decisions.<sup>18</sup> The only question with which the Courts are concerned is only one of legislative competence.<sup>19</sup>

17. *Jnan Prasanna v. Prov. of West Bengal*, A. 1949 Cal. 1 (F.B.); *Lakhinrayan v. State of Bihar*, A. 1950 F.C. 59.

18. *Bhutnath v. Prov. of Bihar*, (1949) 4 D.L.R. 201 (Pat.).

2. But it is an *absolute* condition for the exercise of the power that the Legislature or either House thereof must not be in session at that time.<sup>19</sup> But the Governor may prorogue the Legislature or either House<sup>20</sup> for the purpose of making an Ordinance. If, however, the Ordinance is promulgated *before* the order of prorogation is notified, the Ordinance would be valid.<sup>21</sup>

**'Except when the Legislative Assembly . . . in session'.**

(a) When the State Legislature consists of one House, viz., the Assembly, no Ordinance can be promulgated at a time when the Assembly is in session.<sup>22</sup>

(b) But where there are two Houses, the Governor may promulgate an Ordinance if either of the two Houses has been prorogued. In an Allahabad case,<sup>23</sup> the validity of an Ordinance was upheld even though the Assembly was in session and the Council had been prorogued, just a few days before promulgation of the Ordinance.

**'In session'.**—A House is said to be in session from the date of its first meeting till its prorogation or dissolution.<sup>24</sup>

**Cl. (2): 'Same force and effect as an Act of the Legislature'.**

1. Subject to the limitation as to the duration of the Ordinance as laid down in cl. (2) (a), there is no other limitation upon the Ordinance-making power or the Governor save those that are imposed upon the State Legislature under the Constitution.

2. Hence, an Ordinance may amend or repeal not only another Ordinance but also any law passed by the Legislature itself, subject to the limitation as to its own duration.<sup>25</sup>

3. Similarly, where a law passed by the Legislature could be retrospective in operation, there is nothing to bar an Ordinance on the same subject from being retrospective.<sup>26</sup> Hence, an Ordinance can be given retrospective operation even *from a date when the Legislature was in session*.<sup>27</sup>

4. Though the duration of the Ordinance itself is limited to the period laid down in cl. (2) (a), there is nothing to prevent an Ordinance to prescribe a sentence<sup>28</sup> or to make other provision such as the creation of an office,<sup>29</sup> which will endure even after the expiry of the Ordinance.

5. On the other hand, an Ordinance would be invalid for contravention of the constitutional limitations to which the State Legislature is subject, e.g., Art. 14;<sup>3</sup> 254 (2).<sup>3</sup>

**Cl. (2) (a): 'Shall be laid before Parliament'.**

Notwithstanding the word 'shall', the requirement of laying before Parliament is directory.<sup>3</sup> The only consequence of non-compliance with this requirement is that the Ordinance will cease to operate at the expiration of six weeks from the reassembly of Parliament. It does not affect the initial validity of the Ordinance.

19. *Bidya v. Prov. of Bihar*, A. 1950 Pat. 19.

20. *In re Veerabhadrayya*, A. 1950 Mad. 243.

21. *Vishwanath v. State of U. P.*, A. 1956 All. 557 (560).

22. Cf. C3, Vol. I, p. 529.

23. *Vide Emperor v. Benoarlal* (1945) C.W.N. 174 (P.C.); Cf. *Jnan Prasanna v. Province of West Bengal*, (1948) 53 C.W.N. 27 (71) (F.B.).

24. *United Provinces v. Atiqua*, (1942) F.C.R. 110.

25. *Jogendra v. Superintendent*, A. 1933 Cal. 280.

1. *Haran v. State of W. B.*, A. 1952 Cal. 907.

2. *Bhupendra v. State of Orissa*, A. 1960 Orissa 46 (54).

3. Cf. *Krishnan v. R. T. A.*, A. 1956 Andhra 129 (137).



**'Resolution disapproving of it'.**

These words refer to a resolution directly disapproving of the Ordinance. The fact that the Assembly has refused leave to introduce a Bill incorporating the provisions of the Bill does not amount to a resolution disapproving the Ordinance within the meaning of Art. 213 (2) (a) and it cannot be contended that the Ordinance ceased to be operative from the date when leave to introduce the Bill was refused.<sup>4</sup>

**Proviso to Cl. (3).**

1. This Proviso gives validity to an Ordinance made by the Governor in respect to a matter in the Concurrent List, which is repugnant to a Union law, in the same manner as laid down in Art. 154 (2), as regards an Act of the State Legislature of the same nature. But whereas under Art. 254 (2), assent of the President is required after the Act is passed, the present Proviso validates the Ordinance only if it has been made by the Governor in pursuance of 'instructions' received from the President. Thus, in the one case, the assent of the President is previous and in the other it is subsequent to the legislation.

2. A Governor's Ordinance, made without such previous instruction is void.<sup>5</sup>

3. The concluding words of the Proviso make it clear that where an Ordinance is promulgated in pursuance of instructions from the President, further observation of the Ordinance for the assent of the President under Art. 254 (2), would not be required.<sup>6</sup>

**CHAPTER V.—THE HIGH COURTS IN THE STATES**

High Courts for States. **214.** . . . . There shall be a High Court for each State. . . .<sup>1</sup>

**215.** Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

High Courts to be courts of record.

**Comments.**—See under Art. 129, *ante*. A High Court's power to commit for contempt is now based upon the present article and it is not necessary to refer either to the Letters Patent or the Rules of the Court to determine the ambit of this power.<sup>2</sup>

**'High Court'.**

A Judge of the High Court appointed to an Industrial Tribunal is not a 'High Court' and is not entitled to exercise the power to punish for contempt under Art. 215.<sup>3</sup>

**Procedure to be followed.**

The High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it is fair and gives a reasonable opportunity to the contemner to defend himself. Nothing in the Criminal Procedure is applicable to such proceeding.<sup>4</sup>

4. *Bhupendra v. State of Orissa*, A. 1960 Orissa 46.

5. *Bhulnath v. Prov. of Bihar*, 1949 4 D.L.R. 201 (Pat.).

6. *Laxmibai v. State of M. P.*, A. 1951 Nag. 94.

1. Cls. (2) and (3) have been omitted by the Constitution (Seventh Amendment) Act, 1956.

2. *State of Bombay v. P.*, A. 1958 Bom. 182.

3. *Hayles, in the matter of*, A. 1955 Mad. 1 (F.B.).

4. *Sukhdev v. Chief Justice*, (1954) S.C.R. 454 (463).

**Territorial limitation.**

As a court of record, a High Court can punish a person for contempt committed outside its territorial jurisdiction by a person if such person happens to be within its jurisdiction. But there is no power in the High Court itself to arrest for contempt a person who is outside its jurisdiction.<sup>5</sup>

**216.** Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

Constitution of  
High Courts.

**Amendment.**—The Constitution (Seventh Amendment) Act, 1956, has omitted the Proviso, which was as follows :

"Provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may, from time to time by order fix in relation to that Court."

**Object of Amendment.**—The reason for the omission of the Proviso is that it was "of little significance from the practical point of view, since the Order fixing the maximum may be changed by the President whenever necessary".<sup>6</sup>

**217.** (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty years.<sup>7</sup>

Appointment and  
conditions of the  
office of a Judge of  
a High Court.

Provided that—

- (a) a Judge may, by writing under his hand addressed to the President, resign his office ;
- (b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court ;
- (c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

5. *Horniman in re*, (1943) Bom. L.R. 94.

6. Statement of Objects and Reasons.

7. Substituted for the words "shall hold office . . . sixty years" by the Constitution (Seventh Amendment) Act, 1956.



(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

- (a) has for at least ten years held a judicial office in the territory of India ; or
- (b) has for at least ten years been an advocate of a High Court . . . or of two or more such Courts in succession.

*Explanation.*—For the purposes of this clause—

- (a) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate ;
- (b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

**Sub-cl. (a): 'Has held'.**

These words make it clear that a person who has at any time held a judicial office may be appointed a Judge of the High Court even though he does not hold a judicial office at the time of the appointment.<sup>8</sup>

**218.** The provisions of clauses (4) and (5) of article 124

Application of certain provisions relating to Supreme Court to High Courts.

shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

**219.** Every person appointed to be a Judge of a High Court . . .<sup>10</sup> shall, before he enters upon

Oath or affirmation by Judges of High Courts.

his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath

or affirmation according to the form set out for the purpose in the Third Schedule.

8. *Cf. Mubarak v. Banerji*, A. 1958 All. 323 (324)

9. Art. 218 has been extended to Jammu & Kashmir by the Constitution (Application to J. & K.) Amendment Order, 1960.

10. The words "in a State" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

<sup>11-12</sup>**220.** *No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.*

*Explanation.—In this article, the expression "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956.*

**Amendment.**—This Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, with the following object—

"An important factor affecting the selection of High Court judges from the bar is the total prohibition contained in article 220 on practice after their retirement from the bench. It is proposed to revise the article so as to relax this complete ban and permit a retired judge to practise in the Supreme Court and in any High Court other than the one in which he was a permanent judge."

**221.** (1) There shall be paid to the Judges of each High Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule :

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

<sup>13</sup>**222.** (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. . . .

**Amendment.**—The words "within the territory of India" in cl. (1) and cl. (2) have been omitted by the Constitution (Seventh Amend-

11. Substituted by the Constitution (Seventh Amendment) Act, 1956

12. Article 220 has been extended to Jammu and Kashmir by the Constitution (Application to J. & K.) Amendment Order, 1960, subject to the modification that references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Amendment Order, 1960.

13. Art. 222 has been extended to Jammu and Kashmir, by the Constitution (Application to J. & K.) Amendment Order, 1960, with the addition of cl. (2), as follows :—

"(2) Every such transfer from the High Court of Jammu and Kashmir or to that High Court shall be made after consultation with the *Sadar-i-Riyasat*."



ment) Act, 1956. By reason of the omission of cl. (2), no compensatory allowance would be available to a judge who has been transferred.

**223.** When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, Appointment of acting Chief Justice. by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

<sup>14</sup>**224.** (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty years.

**Amendment.**—This Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, for the following reason—

"The provision in article 224 for recalling retired judges to function on the bench of a High Court for short periods has been found to be neither adequate nor satisfactory. It is, therefore, proposed to replace the article by a provision for the appointment of additional judges to clear off arrears and for the appointment of acting judges in temporary vacancies."

#### **Tenure of an additional Judge.**

The tenure of an additional Judge cannot exceed two years, but there is no bar against his being appointed a permanent Judge (under Art. 217) if he has not attained the age of sixty years.

**225.** Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the

14. Substituted by the Constitution (Seventh Amendment) Act, 1956.

Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

#### Law administered at the commencement of Constitution.

According to this Article, a decision of the Privy Council<sup>15, 16</sup> or the Federal Court<sup>16a</sup> is binding upon the High Courts until the Supreme Court rules to the contrary.

#### 'Jurisdiction'.

The inherent jurisdiction of the High Court is saved by this provision.<sup>17</sup>

#### 'Power to make rules'.

1. These words, together with Art. 372 (1), save the Rules made by the High Courts which were in existence at the commencement of the Constitution.<sup>18</sup> They have the force of law unless *ultra vires* the enactments under which they were made,—the Government of India Acts, 1915 and 1919.<sup>19</sup>

2. A rule-making power which existed at the commencement of the Constitution can be exercised *after* such commencement as well.<sup>20, 21</sup>

3. The Rules made by the High Court would, however, cease to have effect if the appropriate Legislature made any law on the subject.<sup>22</sup>

#### Arts. 225 and 226.

The power to issue the writs under Art. 226 is not subject to or controlled by anything in Art. 225.<sup>23</sup>

**226.** (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or

Power of High Courts to issue certain writs.

15. *Shrinivas v. Narain Deoji*, (1955) 1 S.C.R. 1.

16. *Punjabai v. Shamrao*, A. 1955 Nag. 293.

16a. *Silarama v. State of A. P.*, A. 1959 A.P. 359.

17. *Hari v. Chief Conservator*, A. 1959 Mad. 406.

18. *In re Ranganayakulu*, A. 1956 Andhra 161 (164) F.B.

19. *Venkateswarlu v. Satyanarayana*, A. 1957 Andhra 49.

20. *Seshadri v. Prov. of Madras*, A. Mad. 543.

21. *Mahendra v. Darsan*, A. 1952 Pat. 341.

22. *Satyanarayanamurthi v. I. T. Appellate Tribunal*, A. 1957 Andhra 123.

23. *Shyam Krishen v. State of Punjab*, A. 1952 Punj. 70.



writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

#### General Principles relating to Art. 226.

1. Art. 226 empowers the High Court to issue the writs, directions or orders in the nature of *habeas corpus*, *mandamus*, prohibition *quo warranto* and *certiorari*—(a) for the enforcement of any of the rights conferred by Part III and (b) for any other purpose. Under the first part, a writ may be issued under the Art. only after a decision that the aggrieved party has a *fundamental* right and that it has been infringed. Similarly, under the second part, it may be issued only after a finding that the aggrieved party has a *legal* right which entitles him to any of the aforesaid writs and that such right has been infringed.<sup>24</sup>

2. Where there has been an infringement of fundamental rights, an application under Art. 226 should not be thrown out simply on the ground that the proper writ has not been prayed for.<sup>25</sup> The petitioner is, in such cases, entitled to a suitable order for the protection of his *fundamental right*.<sup>1</sup> Thus, where the Petitioner has asked for relief in a very wide form, the Court would issue the order in the proper form.<sup>2</sup> A High Court is as much bound as the Supreme Court to enforce the Fundamental Rights guaranteed by the Constitution.

3. The powers of the High Court under Art. 226, like those of the Supreme Court under Art. 32 see p. 193, *ante*), are not confined to the 'prerogative writs' and the High Court, in issuing directions, orders and writs under Art. 226 can travel beyond the contents of the writs which are normally issued as writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*.<sup>3</sup>

Art. 226 speaks not of the English writs but of writs 'in the nature of those writs'; consequently, there is no reason why the High Courts in India should feel oppressed by the procedural technicalities of the English writs.<sup>4</sup> Thus, the Court "can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs to English law."<sup>5</sup>

4. Though it is desirable that the prayers in an application under Art. 226 should be as specific and definite as they can be,<sup>6</sup> the Court is not powerless to afford necessary relief to proper cases.<sup>7</sup> Merely because in the cause title Art. 226 has not been specifically mentioned and the proper writ or direction has not been prayed for, an application

24. *State of Orissa v. Madangopal*, (1952) S.C.R. 21.

25. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 : (1950-51) C.C. 10.

1. *Himmattal v. State of M. P.*, (1954) S.C.R. 1122 : (1952-4) 2 C.C. 242 (244); C3, Vol. II, p. 62.

2. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (582).

3. *Parraju v. General Manager, B. N. R.*, 1952 Cal. 610 (612).

4. *Tefraj v. State of M. B.*, A. 1958 M.P. 115 (128).

5. *Basappa v. Nagappa*, (1952-4) 2 C.C. 475 (477) : A. 1954 S.C. 440.

6. *Budge Budge Municipality v. Mongru*, (1953) 57 C.W.N. 25 (49).

7. *Satish v. R. N. Bose*, (1952) 57 C.W.N. 122 (Bose J.).

which is in substance one under Art. 226 cannot be thrown out.\* The Court should mould the remedy according to the circumstances of the case."

5. Art. 226 confers on all the High Courts very wide powers in the matter of issuing writs which they never possessed before. There are *only two limitations* placed upon the exercise of these powers by a High Court under this Article: (a) that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction; (b) that the person or authority to whom the High Court is empowered to issue the writs "must be within those territories", and this implies that they must be amenable to the jurisdiction of the Court either by *residence* or *location* within those territories.<sup>8</sup>

6. But though the powers of the High Courts under Art. 226 are discretionary and no limits can be placed upon that discretion, it must be exercised along recognised lines and not arbitrarily.<sup>11</sup> Thus, in the exercise of this discretionary jurisdiction, the High Courts should not act as courts of appeal or revision to correct mere errors of law<sup>11</sup> or of fact<sup>12</sup> which do not occasion injustice in a broad and general sense.<sup>11</sup>

#### Art. 226, not retrospective.

The Article has no retrospective operation and cannot be used to affect transactions past and closed and rights and liabilities vested before the commencement of the Constitution,<sup>13</sup> e.g., to interfere with an order of dismissal passed by a competent authority prior to the commencement of the Constitution even though the final order in departmental revision proceedings against the order of dismissal has been passed after the commencement of the Constitution.<sup>13</sup>

#### Relief under Art. 226 cannot be barred by statute.

1. The extraordinary powers of the High Court under Art. 226 cannot be taken away or fettered by any legislation, either directly or indirectly, e.g., by making the order final or prescribing notice for a particular period before bringing any proceeding.<sup>14</sup> Relief under Art. 226 will be notwithstanding such statutory provisions, such as in—

(a) S. 535, Bengal Municipal Act.<sup>15</sup>

(b) S. 105, Representation of the People Act, 1950.<sup>16, 17</sup>

(c) S. 3, M. P. Janapada Election Matters Validation Act, 1954.<sup>17</sup>

2. Any law which seeks to take away or restrict the jurisdiction of the High Court under Art. 226 would be void,<sup>18</sup> but before pronouncing a law to be void on this ground an attempt should be made to give the statute a construction, if possible, as will not affect the jurisdiction of the Supreme Court or a High Court under the Constitution.<sup>19</sup>

8. *Niharkumari v. Commr. of Police*, A. 1953 Cal. 179.

9. *Ananikanarayana v. S. Ry.*, A. 1956 Mad. 220 (225).

10. *Rashid v. Income-Tax Investigation Commn.*, (1954) S.C.R. 738.

11. *Sangram v. Election Tribunal*, (1955) 2 S.C.R. 1 (8).

12. *Munnalal v. Scott*, (1950) 57 C.W.N. 157.

13. *State of U. P. v. Nooh*, A. 1958 S.C. 86 (94).

14. *Mehar Singh v. Municipality of Bally*, A. 1954 Cal. 131.

15. *Durgashankar v. Raghuraj*, (1955) 1 S.C.R. 267.

16. *Basappa v. Nagappa*, A. 1954 S.C. 440.

17. *Gulabrao v. Pandurang*, (1958) 60 Bom. L.R. 12 (17) F.B.

18. *Sayeedah v. State of Bihar*, 1951 Pat. 434 (436); *Ram Dubey v. State of M. B.*, A. 1952 M.B. 57 (69).

19. Ref. on the Kerala Education Bill, A. 1958 S.C. 956.



### General Grounds for refusing relief under Art. 226.

(i) The exercise of the powers for 'other purposes' (i.e. purposes other than the enforcement of fundamental rights<sup>20</sup>) is discretionary.<sup>21</sup>

(ii) One of the grounds against the exercise of that discretion would be that the right claimed by the Petitioner is not capable of being established in the summary proceeding under Art. 226.<sup>22</sup> The object of Art. 226 is the enforcement and not the establishment or declaration of a right.<sup>23,24</sup> A petition under Art. 226 cannot be converted into a suit,<sup>25</sup> nor can a writ be utilised for granting what is in essence a declaratory relief.<sup>2</sup>

Thus, in a proceeding under Art. 226, the Court cannot enquire into the merits or rival claims to a property which can be determined only in a suit.<sup>2</sup>

(iii) Ordinarily, a writ under 226 will not be issued when the subject matter involved is already pending in a court of law.<sup>4</sup>

(iv) Where during pendency of the proceeding under Art. 226, the authority against whose order the Petitioner brought the application, offers to the Petitioner all the relief which the Court could have given to the Petitioner, the Court may dismiss the application without costs with a note that no other order on the application is called for in view of the action of the authority subsequent to the filing of the application.<sup>2</sup>

(v) It is a sound exercise of discretion to bear in mind the policy of the Legislature to have disputes about special rights as in *election cases*, decided as speedily as may be. The High Courts should not, therefore, entertain petitions under Art. 226 lightly in this class of cases.<sup>6</sup>

(vi) A writ under Art. 228 would not be issued in circumstances where it would be futile or ineffective,<sup>7</sup> or of a mere academic interest.<sup>8</sup>

[As to grounds of 'delay' and 'existence of alternative remedy' see below].

### Delay, as barring relief.

1. Though there is no specific period of limitation, the High Court may refuse to exercise this extraordinary power where the Petitioner is guilty of delay, for which there is no satisfactory explanation.<sup>9</sup>

20. *Prem Narain v. State of U. P.*, A. 1959 All. 205 (209).

21. *Rashid v. Income-Tax Investigation Comm.*, (1954) S.C.R. 738; *B. B. Light Ry. Co. v. State of Bihar*, A. 1951 Pat. 231 (241).

22. *Bibhuti v. Damodar Valley Corp.*, A. 1953 Cal. 581.

23. *Dinesh v. State of M. B.*, A. 1953 M.B. 165.

24. *Narasareddi v. State of Andhra*, A. 1957 Andhra 489.

25. *Collector of Monghyr v. Pratap Singh*, A. 1957 Pat. 102 (103) F.B.

1. *State of Madras v. Kassimla Charities*, A. 1957 Mad. 361.

2. *Venugopalan v. Vijawada Municipality*, A. 1957 Andhra 833 (837).

3. *Sohan Lal v. Union of India*, A. 1957 S.C. 529 (531).

4. *Kallash v. A. A. C.*, A. 1952 Ajmer. 31.

5. *Lokanath v. Vice-Chancellor*, A. 1952 Orissa 198.

6. *Sangram Singh v. Election Tribunal*, (1955) 2 S.C.R. 1 (8).

7. *S. K. Bose v. Krishnanagar Municipality*, A. 1956 Cal. 393 (396).

8. *Prem Narain v. State of U. P.*, A. 1959 All. 205 (209).

9. *Sri Nivas v. Election Tribunal*, A. 1955 All. 251; *Nathmooni v. Biswanath*, A. 1951 Mad. 250; *Abdul Hamid v. State of W. B.*, (1952) 89 C.L.J. 268 (275); *Jahir v. State of Assam*, A. 1956 Assam 12; *Subba Rao v. D. T. S.*, A. 1958 A.P. 206.

2. Delay, however, is not an absolute bar—

(a) In cases of a gross character, e.g., where an authority making an order did not apply its mind to the making of the order at all.<sup>10</sup>

(b) Whether the delay is explained,<sup>11</sup> e.g., where the applicant is a social organisation like a club which does not ordinarily seek litigation, and thus did not promptly object to an illegal tax;<sup>12</sup> or where the petitioner was pursuing a legal remedy;<sup>13</sup> or where he had promptly protested to the proper authorities and the latter did not reply.<sup>14</sup>

(c) Where the complaint is against an illegal levy.<sup>15</sup>

(d) Where a fundamental right has been infringed.<sup>16</sup>

3. In a petition for *certiorari*, where the order complained of is manifestly erroneous or without jurisdiction, the Court would be loath to reject the petition simply on the ground of delay.<sup>17</sup> Unless owing to laches inconsistent legal or equitable considerations have arisen which cannot be ignored, the Court cannot be precluded from rectifying a grave injustice simply because the Petitioner did not move in the matter earlier.<sup>18, 19</sup>

4. A Court of appeal would not entertain an objection on the ground of delay unless it was raised in the proceeding under Art. 226,<sup>21</sup> so to afford an opportunity to the applicant to show that there were sufficient reasons why he could not come earlier.<sup>21</sup>

5. There is a consensus of opinion that the pursuit of an extra-legal remedy, such as a departmental representation in the nature of an appeal for mercy, is no ground for condoning delay.<sup>22, 23</sup> But where a departmental remedy such as appeal is provided by statute, an application under Art. 226 would not be entertained unless and until the applicant exhausts the statutory remedy. In such a case, the departmental remedy should be considered as a legal remedy.<sup>24</sup>

6. As regards the lapse of time that would be considered as constituting delay, in some cases it has been held that the delay should be explained with reference to special circumstances unless the application under Art. 226 is filed within the time prescribed by the Limitation Act for appeal<sup>25</sup> or revision.<sup>4</sup>

According to the Andhra High Court,<sup>4</sup> six months is a reasonable period for *certiorari*.<sup>4</sup>

10. *Jagjiwandas v. State of Bombay*, (1952) 7 D.L.R. 149 (Bom.).

11. *Venkateswarlu v. State of Madras*, A. 1954 Mad. 587.

12. *Cosmopolitan Club v. D. C. Tax Officer*, A. 1952 Mad. 132.

13. *Gandhinagar M. T. S. v. State of Bombay*, A. 1954 Bom. 202.

14. *General Manager v. Yakub*, A. 1950 Mad. 88.

15. *Somathmal v. State of Rajasthan*, A. 1954 Raj. 162.

16. *Suleman v. Naranarayan*, A. 1955 Assam 163 (170).

17. *Damodar v. Naranarayan*, A. 1955 Assam 163 (170).

18. *Krishna v. Chief Secy.*, A. 1954 Nag. 151 (F.B.).

19. *Hukam Singh v. Sardul Singh*, A. 1953 Pepsu 133.

20. *Mahadeva v. State*, A. 1954 T.C. 460 (F.B.).

21. *Nanda v. Board of Trustees*, A. 1957 Cal. 578 (581).

22. *Gandhinagar M. T. Society v. State of Bombay*, A. 1954 Bom.

202.

23. *Phillipson v. State*, A. 1955 T.C. 175.

24. *Sikri Bros. v. State of Punjab*, A. 1957 Punj. 220.

25. *Devre v. Home Minister*, A. 1957 Hyd. 14.

1. *S. T. & E. Co. v. State of Punjab*, A. 1954 Punj. 264.

2. *Pholchand v. Nagpur University*, A. 1957 Bom. 215.

3. *Mongey v. Board of Revenue*, A. 1957 All. 47.

4. *Mahadeva v. State*, A. 1954 T.C. 469 (F.B.).

5. *Venkata v. D. T. S.*, A. 1958 A.P. 206.



The proper view seems to be that no hard and fast rule can be laid down in the matter and each case should be decided according to its circumstances,<sup>12</sup> without adhering to any fixed period, long or short. In other words, there may be inexcusable delay even where the application is filed within 45 days of the order complained of.<sup>13</sup> On the other hand, the Court may interfere in appropriate cases even where the application is filed beyond the period prescribed for revision.<sup>14</sup>

### Acquiescence.

Relief under Art. 32<sup>1</sup> or 226<sup>14</sup> has also been refused on the ground of acquiescence. Thus,—

(i) Where the Petitioners' income-tax cases were transferred from one Income-tax officer to another and they acquiesced in the jurisdiction of the officer before whom they were transferred until assessments were made by him and thereafter challenged the validity of the law under which the transfer was made, in the light of a decision of the Supreme Court on the constitutionality of an analogous provision, the Petition under Art. 32 was refused that the acquiescence of the Petitioners disentitled them to relief.<sup>15</sup>

(ii) As regards the constitutionality of statutes even, the view has been taken that though an unconstitutional statute cannot be validated by estoppel or acquiescence, a person who has received a benefit under a statute is not entitled to challenge its constitutional validity.<sup>16</sup>

(iii) As to the effect of acquiescence in proceedings for Prohibition or Certiorari on the ground of want of jurisdiction, see under those writs, *post*.

### Suppression and misstatement of facts.

1. An application under Art. 226 would be refused<sup>17</sup> without a hearing on the merits or a rule  *nisi*  discharged, if it appears that the applicant has made a *deliberate* concealment or misstatement of *material* facts<sup>18</sup> with a view to mislead the Court.<sup>19</sup>

2. Before coming to this conclusion, however, a careful examination will be made of the facts as they are and as they have been made in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has been set in motion by means of a misleading affidavit.<sup>18</sup>

3. Where there is no concealment of facts, but a mere wrong interpretation of some document, the application cannot be refused on that ground alone.<sup>14</sup>

6. *Krishna v. Chief Secy.*, A. 1954 Nag. 151 (F.B.).

7. *Devre v. Home Minister*, A. 1957 Hyd. 14.

8. *Swaraj Motors v. Municipal Council*, A. 1954 T.C. 466; *Arthur v. Collector of Customs*, A. 1958 Ker. 357.

9. *Pannalal v. Union of India*, A. 1957 S.C. 397 (412).

10. *M. U. M. Services v. R. T. A.*, A. 1953 Mad. 59.

11. *Narayana v. State of Andhra*, A. 1950 A.P. 471 (475).

12. *Deptylal v. Collector*, (1959) 2 M.L.J. 208.

13. *Ratan v. Adhar*, (1951) 56 C.W.N. 303 (304).

14. *Zikar v. Madhya Pradesh*, A. 1951 Nag. 16; *Ibrahim v. High Commr.*, A. 1951 Nag. 38 (43); *Rekht v. J. T. Officer*, A. 1951 Simla 1; *Asiatic Engineering v. Achru Ram*, A. 1951 All. 746 R.B.

15. *Marappa v. C. R. T. Board*, (1956) 1 M.L.J. 324.

16. *Agarwal v. R. T. A.*, (1952) 7 D.L.R. 41 (45).

**How far existence of an alternative remedy bars an application under Art. 226.**

(A) The remedy under Art. 226 being *discretionary*,<sup>17</sup> the High Court may refuse to grant it where there exists an alternative remedy,<sup>18</sup> equally efficient and adequate,<sup>17,19</sup> unless there are good grounds therefor.<sup>19</sup>

2. Whether the alternative remedy is equally efficacious or adequate is a question of fact to be decided in each case, the onus being on the applicant to show that it is not adequate.<sup>19,20</sup>

3. Where the Petitioner may get *adequate* relief by an ordinary action at law, *i.e.*, a civil<sup>21,22</sup> or a criminal proceeding,<sup>23</sup> relief under Art. 226 may be refused.<sup>24</sup> Thus,

(a) An application under Art. 226 will not be entertained for the purpose of enforcement of a contract<sup>25</sup> or for a declaration that it is void,<sup>26</sup> or for relief for infringement of a copyright,<sup>27</sup> or for compensation for some wrongful act of the Government.<sup>28</sup>

(b) A writ under Art. 226 has, accordingly, been refused where the Petitioner could get adequate remedy—

(i) under ss. 386-7;<sup>29</sup> or s. 439<sup>30</sup> of the Cr. P. C.; or

(ii) under s. 14 of the Arbitration Act.<sup>31</sup>

4. Where the Petitioner *has already instituted* a suit<sup>32</sup> or other proceeding under the ordinary law,<sup>33</sup> or has preferred appeal<sup>34</sup> before a statutory tribunal, no application under Art. 226 will be entertained on the same questions, at least so long as those proceedings are not disposed of.

5. Where an alternative remedy was available the Petitioner cannot allow that to be time-barred and then apply under Art. 226 and

17. *Union of India v. Verma*, A. 1957 S.C. 882 (884); *Veluswami v. Raja*, A. 1959 S.C. 442 (429).

18. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 (572).

19. *Rashid v. I. T. I. Commission*, A. 1954 S.C. 207 (210) : (1954) S.C.R. 738.

20. *Dineshchandra v. State of M. B.*, A. 1953 M.B. 165.

21. *Karrar Ali v. State of U. P.*, A. 1954 All. 753; *Amrillal v. Govt. of Assam*, A. 1954 Assam 152; *Naresh v. Union of India*, A. 1952 Cal. 757; *Venkatanarasaya v. State of Madras*, A. 1953 Mad. 80; *Dinesh v. State of M. B.*, A. 1953 M.B. 165; *Fishermen's Co-operative Society v. Collector*, A. 1956 Andhra 119.

22. *Sohan Lal v. Union of India*, A. 1958 S.C. 529.

23. *Ram Singh v. State*, A. 1952 Pepsu 136.

24. *Santli Priya v. Surendra*, A. 1952 Cal. 137 (139).

25. *Chaahar Singh v. State of Punjab*, A. 1953 Punj. 230; *Laxman v. Rajpramukh*, A. 1953 M.B. 54; *Dubar v. Union of India*, A. 1952 Cal. 496.

1. *B. B. Light Ry. v. State of Bihar*, A. 1951 Pat. 231; *Indian Tobacco Corp. v. State of Mad.*, A. 1954 Mad. 549.

2. *K. Publishing House v. Govt. of T. C.*, A. 1952 T.C. 38.

3. *Kishore v. Dy. Commr.*, A. 1955 Assam 183.

4. *Ram Singh v. State*, A. 1952 Pepsu 136.

5. *Nazir Hossain v. State of W. B.*, A. 1952 Cal. 853.

6. *Ganapathi v. Narayanaswami*, A. 1957 Mad. 405.

7. *Govind v. State*, A. 1957 All. 737.

8. *Ajit v. Sarbamangala*, A. 1954 Pat. 476.

9. *Rashid v. I. T. I. Commn.*, A. 1954 S.C. 207.

10. *Vijay Transport v. Appellate Tribunal*, A. 1958 Raj. 165.



urge that he has no other remedy,<sup>11,12</sup> unless there are exceptional circumstances to explain how the alternative remedy became time-barred.<sup>13</sup>

6. In particular, when a right or liability is created by a statute which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy and a writ would not, *ordinarily*, be available.<sup>14</sup>

Thus, a writ under Art. 226 has been refused—

(i) Where an appeal lay against the order complained of, under s. 7 of the Industrial Disputes (Appellate Tribunal) Act, 1950.<sup>15</sup>

(ii) Where remedy by appeal or revision was open to the Petitioner under ss. 64-64A of the Motor Vehicles Act.<sup>16</sup>

(iii) Where the Petitioner had a statutory right of appeal to the State Government, under the Police Act.<sup>17</sup>

(iv) Where the Petitioner has the remedies of appeal and revision under the Sales Tax Act to challenge the *amount* of assessment.<sup>18</sup>

(v) Where the Petitioner could have remedy under s. 26<sup>19</sup> of the Administration of Evacuee Property Act or under r. 22 of the Rules<sup>20</sup> framed thereunder.

7. At any rate, where the Petitioner has already taken resort to the statutory machinery, he cannot, simultaneously apply under Art. 226, without waiting for the decision of the statutory authority.<sup>21</sup> The Calcutta High Court has gone further to hold that where a person has already availed himself of the statutory remedy (say, appeal) but failed, he cannot thereafter apply under Art. 226 to challenge the validity of the original order.<sup>22</sup> His remedy, if any, lies only against the decision of the appellate authority.<sup>23</sup>

8. Where pending the application under Art. 226, a statutory right of appeal to an independent Tribunal is created by the Legislature, the Petitioner should be directed to seek his redress before that Tribunal, particularly when the questions involved are mixed questions of fact and law.<sup>24</sup>

(B) But—

1. A statutory remedy cannot be said to be an adequate alternative remedy—

(a) Where the remedy is *discretionary* and the Petitioner cannot avail of it as of right,<sup>25</sup> e.g.,  
Revision under s. 64A of the Motor Vehicles Act.<sup>1</sup>

(b) Where the remedy is *illusory*, e.g.,

(i) An appeal to the Government would be of little use to the Petitioner where the order complained of was issued by the subordinate

11. *Viswamitra Press v. Authority*, A. 1955 All. 702.

12. *Pramode v. A. D. M.*, A. 1957 Cal. 164.

13. *B. T. Depot v. Commr. of Commercial Tax*, A. 1958 Cal. 246.

14. *Veerappa v. Raman*, (1952) S.C.R. 583.

15. *Ganesh v. U. P. Govt.*, A. 1952 All. 992.

16. *R. U. M. Service v. State of Madras*, A. 1955 Mad. 205.

17. *Kassam v. Chudasama*, A. 1956 Bom. 545 (548).

18. *Dayabhai v. State of Bihar*, A. 1959 Pat. 389.

19. *Bhasin v. Custodian*, A. 1954 Punj. 165.

20. *Chhaganlal v. Asstt. Custodian*, A. 1956 Sau. 47 (50).

21. *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738 : (1952-4) 2 C.C. 454 (456).

22. *Abanindra v. Majumdar*, A. 1956 Cal. 273 (274) F.B.

23. *Kanai v. Collector of Customs*, (1956) 60 C.W.N. 1042.

24. *Orissa Mineral Development Co. v. S. T. Commr.*, A. 1960 Orissa 79.

25. *Brijkishore v. R. T. O.*, A. 1954 All. 428; *Laxmanrao v. Addl. Dy. Commr.*, A. 1955 Nag. 158.

1. *Basha v. Sultan*, A. 1959 Mys. 17.

authority under prior consultation with the Government,<sup>2</sup> or under directive issued by the Government.<sup>3</sup>

(ii) An appeal would be similarly useless where the appellate authority or tribunal was not competent to decide the question agitated in the petition under Art. 226, e.g., the question of jurisdiction.<sup>4</sup>

2. But the existence of an alternative remedy is not an absolute bar to the relief under Art. 226. It is a circumstance which the Court has to take into consideration, in exercising its discretionary power under Art. 226.<sup>5,6</sup>

3. The existence of an adequate alternative remedy, whether statutory<sup>7,8</sup> or otherwise,<sup>9</sup> is no bar to relief under Art. 226—

(a) Where a fundamental right has been infringed;<sup>10</sup> e.g.,—

Where a sales-tax has been imposed under a law which contravenes Art. 286;<sup>11</sup> or the imposition is *ultra vires* being covered by the exemptions granted by the law itself,<sup>12</sup> because the illegal taxation imposed on sales violates Art. 19 (1) (g).<sup>13</sup>

(b) Where some mandatory provision of the Constitution has been violated, such as Art. 311<sup>14</sup> or 320.<sup>15</sup>

(c) Where the Act which provides the alternative remedy is itself unconstitutional or *ultra vires*.<sup>16</sup>

(d) Where the statutory rule under which the order has been made is itself *ultra vires* the statute under which it purports to have been made.<sup>17</sup>

(e) Where the authority against whom complaint is made has violated the rules of natural justice.<sup>18</sup>

(f) Where the alternative remedy is too costly or ineffective or entails such delay that the applicant would be irreparably prejudiced<sup>19,20</sup> or the remedy might prove valueless.<sup>21,22</sup>

Thus,

(i) Where a person has been prosecuted at the instance of municipal body, his petition under Art. 226, questioning the validity of the constitution of the municipal body cannot be rejected on the ground that such plea could be taken in the criminal proceedings.<sup>23</sup>

2. *Rajiah v. Inspector*, A. 1955 Mad. 584.

3. *B. E. S. Co. v. C. T. O.*, A. 1956 Cal. 300 (301).

4. *Indian Metal Corp. v. Industrial Tribunal*, A. 1953 Mad. 98.

5. *Sastri v. Pravailevarna*, A. 1956 Mad. 146.

6. *Atulya v. Director*, A. 1953 Cal. 548.

7. *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122 (1126).

8. *B. I. Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (620, 672).

9. *State of Bombay v. United Motors*, (1933) S.C.R. 1060.

10. *Kailash Nath v. State of U. P.*, A. 1957 S.C. 790.

11. *Bedi v. Govt. of Punjab*, A. 1953 Pepsu 196; *Ramchandra v. State of Bhopal*, A. 1954 Bhopal 25; *Krishna v. General Manager*, A. 1954 Punj. 245; *Chowdhury v. Union of India*, A. 1956 Cal. 602 (698).

12. *Chelaram v. State of Rajasthan*, A. 1954 Raj. 12.

13. *B. I. Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (620, 672).

14. *Noor Mohamed v. State of Madras*, A. 1957 Mad. 33 (40).

15. *S. C. Prashar v. Dwarkadas*, A. 1956 Bom. 530 (534).

16. *Gobardhan v. Collector*, A. 1956 All. 271 [liability to be arrested].

17. *Purshollam v. State of U. P.*, A. 1959 All. 26 [where, unless the order of removal was immediately quashed, the Petitioner would be debarred from contesting at the next election which was to take place shortly].

18. *Rajeswari v. State of U. P.*, A. 1954 All. 608.

19. *Rakhaldas v. Ghose*, A. 1952 Cal. 171.

20. *Brijnivas v. Chief Commissioner*, A. 1956 Ajmer 73 (77).



(ii) Where a machine belonging to an occupier has been unlawfully seized by a municipal authority in execution of a warrant against the owner of the premises, the occupier is entitled to apply under Art. 226, for, the machine would have been sold and lost to him if he were to pursue his ordinary legal remedies.<sup>21</sup>

(iii) Where the grievance of the Petitioner is that his mining lease has been cancelled in violation of the rules of natural justice, he cannot be relegated to his statutory remedy or to a suit where the period of his lease is likely to expire before he could succeed under such alternative remedies.<sup>22</sup>

(iv) Availability of a remedy by suit has not been accepted as a ground for refusing relief under Art. 226 when a person's services have been terminated<sup>23</sup> or reduced in rank<sup>24</sup> in violation of Art. 311.

(g) Where the alternative remedy is of an onerous or burdensome character,<sup>25</sup> e.g., where the Petitioner would be required to deposit the entire amount of the impugned tax before he could seek the statutory remedy,<sup>1,2</sup> e.g., appeal under s. 30 (1A), Income-Tax Act.<sup>1</sup>

(h) Where from the affidavit of the administrative Tribunal or appellate authority or from the other materials in the proceedings under Art. 226, the Court is satisfied that it was not possible for the Petitioner to get justice by pursuing the statutory remedy.<sup>4</sup>

(i) Where it is beyond the competence of the statutory authority to grant relief on the ground urged in the Petition under Art. 226, e.g.,—

Where the objection of the Petitioner is not against a particular entry in the Electoral Roll prepared under a municipal law, but that the entire Roll has been prepared in contravention of the law.<sup>4a</sup> The same principle applies where the grievance of the Petitioner is otherwise beyond the scope of an election petition.<sup>4b</sup>

(j) Where a large number of persons are involved and the question is of general importance,<sup>3</sup> and relegating the parties to a suit would cause hardship<sup>3</sup> or serious delay,<sup>4c</sup> e.g., where the validity of a tax or other imposition is in question.<sup>4,7</sup>

4. The possibility of having the following remedies have not been considered as 'alternative remedies' for refusing relief under Art. 226, on the ground that these are not alternative specific legal remedies, but discretionary remedies which are granted in extraordinary circumstances :<sup>8</sup>

21. *Mehar Singh v. Municipality of Bally*, A. 1954 Cal. 131.

22. *Jahar v. State of Rajasthan*, A. 1959 Raj. 220.

23. *Bedi v. Govt. of Patiala*, A. 1953 Pepsu 196; *Hiranmay v. State of Assam*, A. 1954 Assam 224; *Budh Singh v. State of U. P.*, A. 1958 All. 607.

24. *Mohinder v. State of Pepsu*, A. 1955 Pepsu 106.

25. *Himmattilal v. State of M. P.*, (1954) S.C.R. 1122 (1127).

1. *A. I. Jute Mills v. Dutt*, A. 1956 Cal. 450.

2. *Rajkishore v. Dt. Board*, A. 1954 All. 675.

3. *Amar Dass v. Govt. of Pepsu*, A. 1953 Pepsu 88.

4. *Glaxo Laboratories v. Venkateswarana*, A. 1959 Bom. 371 (380).

4a. *Amulya Ratan v. Commr.*, A. 1959 Cal. 548 (550).

4b. *Hariprasad v. State of M. P.*, A. 1959 M.P. 342 (345) P.B.

4c. *Buddhu v. Municipal Board*, A. 1952 All. 753 (P.B.).

5. *Ram Adhar v. Dt. Bd.*, A. 1955 All. 184.

6. *Konduri v. State of Hyderabad*, A. 1954 Hyd. 1 (P.B.).

7. *Bonmarillal v. State of Rajasthan*, A. 1953 Raj. 180.

8. *Ranganathan v. M. E. T.*, A. 1952 Mad. 650 (622).

(a) Appeal by special leave under Art. 136.<sup>10</sup> Even where leave under Art. 136 has been already refused by the Supreme Court that fact cannot take away the *jurisdiction* of the High Court to interfere, under Art. 226, even though it may be taken into consideration in deciding whether the discretion to grant the relief should be exercised in a given case,<sup>11</sup> particularly if the grounds upon which relief is sought under Art. 226 are the very grounds upon which special leave under Art. 136 has been refused.<sup>11</sup>

(b) Relief under Art. 227.<sup>12</sup>

5. The existence of an alternative remedy is no ground for refusing prohibition<sup>13</sup> or *certiorari*<sup>14</sup> where—

(a) the absetice or excess of jurisdiction is patent and the application is made by the party aggrieved;<sup>15</sup> or

(b) there is an error apparent on the face of the records;<sup>16,17</sup> or

(c) there has been a violation of the rules of natural justice.<sup>17,18</sup>

6. Similarly, notwithstanding the existence of an alternative remedy, the Court would issue *Quo Warranto* where the alleged intrusion is patent.<sup>19</sup>

### Nature of Proceeding.

(A) *Proceedings for writs other than habeas corpus*.—These are generally considered as civil proceedings,<sup>21</sup> which are, unless excluded by specific rules relating to Art. 226, governed by the provisions of the C. P. Code, in so far as they are applicable.<sup>22</sup>

According to the Madras<sup>23</sup> High Court, these are proceedings under the Original Civil Jurisdiction of the High Court.

According to the Calcutta<sup>24</sup> High Court, on the other hand, though it is an original<sup>25</sup> as distinguished from the appellate or revisional jurisdiction, it is a new jurisdiction, not to be included in the Ordinary Original Civil Jurisdiction under the Letters Patent. The Andhra High Court,<sup>26</sup> accordingly, calls it 'extraordinary' original jurisdiction.

(B) *Proceeding for habeas corpus*.—Prior to the Constitution, there was a conflict of judicial opinion as to whether a proceeding for *habeas corpus* under s. 491, Cr. P. C. was a civil or criminal proceeding.

9. *Mehnga Ram v. Labour Appellate Tribunal*, A. 1956 All. 644 (648).

10. *Emmally v. Venkataswami*, A. 1959 Ker. 291 (292).

11. *W. I. Match Co. v. Industrial Tribunal*, A. 1958 Mad. 398.

12. *Sarin v. Patil*, A. 1954 Bom. 171.

13. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603 (764); *Prashar v. Dwarkadas*, A. 1956 Bom. 530.

14. *Asiatic Engineering v. Achhru Ram*, A. 1951 All. 646 (P.B.).

15. *Govinda v. Pattabhirama*, A. 1954 Mad. 161.

16. *Nalini v. Ananda*, A. 1952 Cal. 112.

17. *Rakhaldas v. Ghose*, A. 1952 Cal. 171.

18. *Sasamusa Sugar Works v. State of Bihar*, A. 1955 Pat. 49.

19. *Allauddin v. Meher*, A. 1952 Bom. 213.

20. *Venkati v. State of M. P.*, A. 1955 Nag. 9.

21. *Hossen Kasem v. State of M. P.*, A. 1952 Nag. 305 (mandamus).

22. *Nimar Cotton Press v. S. T. O.*, A. 1956 27 (31).

23. *Ramayya v. State of Madras*, A. 1952 Mad. 300.

24. *Budge Budge Municipality v. Mangru*, (1952) 57 C.W.N. 25 (44).

25. *Aldal Singh v. Karan Singh*, A. 1957 All. 414 (433).

1. *Satyannarayanamurti v. I. T. Appellate Tribunal*, A. 1957 Andhra 123.



While the Calcutta<sup>2</sup> and Bombay<sup>3</sup> High Courts took the view that it was a civil proceeding, the Allahabad,<sup>4</sup> Lahore,<sup>5</sup> Madras<sup>6</sup> and Nagpur<sup>7</sup> High Courts held that it was criminal in nature.

Since the power to issue writs of habeas corpus, under the Constitution, is no longer to be derived from the Criminal Procedure Code, it seems that a habeas corpus proceeding would now be regarded as a civil or criminal proceeding, according to the nature of the proceeding out of which the application for the writ arises, the question being one of substantive law.<sup>8</sup>

Thus, an application for *habeas corpus* against detention under the Preventive Detention Act, is to be treated as a criminal proceeding.<sup>9</sup>

### Forum.

According to Rules made by the Allahabad,<sup>10,11</sup> Rajasthan, Patna, Orissa and Mysore High Courts, an application under Art. 228 lies before a Division Bench. In the Madras,<sup>12</sup> Calcutta,<sup>13</sup> Nagpur,<sup>14</sup> Andhra,<sup>15</sup> Bombay, Assam, and Trav-Cochin High Courts, a Single Judge can exercise the jurisdiction.<sup>16</sup>

### Territorial jurisdiction.

1. The writs do not run beyond the territories in relation to which each High Court exercises jurisdiction.<sup>17</sup> Hence, a High Court cannot issue a writ or order under Art. 226 unless the person, authority or Government against whom the writ is sought is (physically) resident or located within the territorial jurisdiction of the High Court.<sup>18</sup>

2. It is the residence or permanent location of the respondent and not the operation<sup>19</sup> of the impugned order or accrual of the cause of action<sup>20,21</sup> which is material for determining jurisdiction of the High Court. Thus, a High Court cannot assume jurisdiction to interfere with an order issued by an authority located outside the jurisdiction of the High Court on the ground that the order affects rights within the territorial jurisdiction of the High Court.<sup>22</sup> Conversely, if the inferior tribunal is situated within the territorial limits of the High Court, it can exercise jurisdiction under this Article even though the dispute may have arisen outside such territorial limits.<sup>23</sup>

2. *Niharendu v. Porter*, (1944) Cal. 489 (520) : A. 1945 Cal. 107.

3. *Mohammad Ali v. Ismailji*, (1926) 50 Bom. 616.

4. *Haldari v. Jawal*, A. 1934 All. 606 (702).

5. *Kishorilal v. R.*, (1945) Lah. 573.

6. *In re Venkataratnam*, (1948) 2 M.L.J. 513.

7. *Haridas v. Prov. Govt.*, A. 1949 Nag. 201.

8. *Cf. R. v. Home Secy.*, (1942) 2 All. E.R. 381 : (1943) A.C. 147 (156).

9. *In re Venkateswara*, A. 1951 Mad. 611.

10. *Ram Prasad v. State*, A. 1952 All. 843.

11. *Masehullah v. Abdul*, A. 1953 All. 193.

12. *Ramayya v. State of Madras*, A. 1952 Mad. 300.

13. *Budge Budge Municipality v. Mangru*, (1952) 57 C.W.N. 25.

14. *Cf. N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232 (234).

15. Except those relating to *habeas corpus*.

16. *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738 : (1952-4) 2 C.C.

454 (458).

17. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

18. *Shamji v. State of M. P.*, A. Nag. 161.

19. *Musaffar v. Potti*, (1955) 2 S.C.R. 1196.

20. *Bhardwaj v. C. M. O.*, A. 1955 Pat. 76.

*Illustration.*

The assessee who were residents of the State of U.P. and whose original assessments had been made by the income-tax authorities of that State filed petitions in the Punjab High Court for issue of writ of Prohibition against the Income-tax Investigation Commission located in Delhi directing it not to proceed against the Partitions under Act XXX of 1947. *Held*, that the Punjab High Court had jurisdiction to issue the writ against the Commission which was located within its jurisdiction notwithstanding the fact that the assessee were within the State of U.P. and their original assessments were made by the income-tax authorities of that State.<sup>21</sup>

3. Though the Constitution has not located the seat of the Government of India at any particular place, it is common knowledge that the seat, at present, is at New Delhi,<sup>22</sup> from where the President, acting through his Council of Ministers, normally carries on the business of the Government of India.

4. In the result, only the Punjab High Court has jurisdiction to issue a writ against—

- (i) The Government of India.<sup>21, 22</sup>
- (ii) The Election Commission.<sup>23</sup>
- (iii) The Central Board of Revenue.<sup>24</sup>
- (iv) The Custodian General of Evacuee Property.<sup>25</sup>
- (v) Life Insurance Corporation of India.<sup>25a</sup>

5. A distinction has, in this connection, to be made between (a) cases where a subordinate agency works within the jurisdiction of a High Court under the direction of a superior situated outside; and (b) cases in which the order of a superior tribunal, situated outside the jurisdiction, remain outstanding and cannot be reached by the High Court:

(A) But where, though the Authority is located outside the jurisdiction of the High Court, the impugned illegal act or order is done or made by an agent or subordinate officer of that Authority who is resident within the jurisdiction of the High Court, the Court can proceed against such agent or officer who cannot be heard to say that he is simply obeying the unlawful directions of his superior Authority which is located outside the jurisdiction of the High Court.<sup>1</sup>

Thus,—

Though the Allahabad High Court had no jurisdiction against the Income-tax Investigation Commission or the Government of India for having issued an order under s. 8 (2) of the Taxation of Income (Investigation Commission) Act, it could issue a writ against the Income-tax Officer, Kanpur, for having issued a notice under s. 34 of the Income-tax Act, though it was in pursuance of the directions given by the Government of India.<sup>2</sup>

(B) Where, however, the order made by a subordinate officer within the jurisdiction of the High Court merges<sup>3</sup> in the order of the superior

21. *Ram Kirpal v. Union of India*, A. 1955 All. 468 (472).

22. *Nirmal v. Union of India*, A. 1959 Cal. 506 (512); *Radheshyam v. Union of India*, A. 1960 Bom. 363 (362).

23. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144; A. 1953 S.C. 210.

24. *B. I. Commercial v. Collector of Customs*, A. 1960 Cal. 1 (2).

25. *Barkatali v. Custodian General*, A. 1954 Raj. 214.

25a. *John v. Life Insurance Corp.*, A. 1960 Ker. 251.

1. *Musalliar v. Potti*, (1955) 2 S.C.R. 1196; A. 1956 S.C. 246.

2. *Gangadhar v. I. T. Investigation Commission*, A. 1955 All. 515.

3. *Cf. Azmatulla v. Custodian*, A. 1955 All. 435; *Joginder v. Director*, A. 1955 Pepsu 91.



authority which is located outside the jurisdiction, the High Court cannot issue the writ either against the subordinate or the superior authority, for—

"In that situation, a writ against the inferior authority could be of no avail to the Petitioner concerned and could give him no relief for the order of the superior authority outside the territories would remain outstanding and operative against him."<sup>1</sup>

(a) There is such merger in the case of an administrative appeal, or revision,<sup>2,3</sup> where the appellate authority reverses the order of the subordinate authority.<sup>4,5</sup>

In such a case, the High Court does not acquire jurisdiction over the Appellate Authority situated outside its jurisdiction merely because it forwards a copy of its decision to the subordinate tribunal situated within the High Court's jurisdiction.<sup>6</sup>

(b) But there has been a difference of opinion as to whether a merger of the order of the subordinate authority similarly takes place where the order is confirmed by the appellate or revising authority.

A. The Pepsu,<sup>7</sup> Nagpur,<sup>8</sup> Madhya Pradesh<sup>9</sup> High Courts have applied the principle that the decree of the lower Court merges into that of the appellate Court to hold that the administrative order of the subordinate authority merges into the order of the superior authority even where the latter confirms the original order.

B. The Rajasthan,<sup>10</sup> Calcutta<sup>11</sup> and Madhya Pradesh<sup>12</sup> High Courts have, on the other hand, held that in the case of confirmation, there is no merger of the original order, so that the High Court would retain its jurisdiction over the order of the subordinate authority within its territory even though it may have no territorial jurisdiction over the confirming authority.

The Calcutta High Court<sup>13</sup> has relied upon the observation of the Supreme Court in *State of U. P. v. Nooh*<sup>14</sup> that the doctrine of merger of an original decree operates only for certain purposes, such as limitation and that, at any rate, an original administrative order is not suspended by the mere presentation of appeal or revision before a superior authority. Hence, even though there has been an appeal resulting in a confirmation of the original order, relief under Art. 226 is available against the original order.

6. The doctrine of merger, however, does not apply where the original order was a nullity.<sup>15</sup> Where the order of the inferior tribunal was a nullity the appellate tribunal had nothing to do and the fact that the appellate tribunal was situated outside the jurisdiction of the High Court cannot bar the issue of *certiorari*.<sup>16</sup>

4. *Musaliar v. Potti*, (1956) S.C.A. 259 (273) : (1955) 2 S.C.R. 1196.

5. *Lakshmi v. Collector*, A. 1955 Andhra 178.

6. *Joginder v. Director*, A. 1955 Pepsu 91.

7. *K. F. & S. Works v. State of Bihar*, A. 1959 Pat. 61.

8. *Barkatali v. Custodian General*, A. 1954 Raj. 214.

9. *Surajmal v. State of M. P.*, A. 1958 M.P. 103 (115) F.B.

10. *Pavoo v. State*, A. 1959 Ker. 65 (67).

11. *Burhanpur N. T. W. Union v. Labour Appellate Tribunal*,

A. 1955 Nag. 148.

12. *Prem Chand v. State of M. P.*, A. 1958 M.P. 103 (114).

13. *Barkatali v. Union of India*, A. 1954 Raj. 214.

14. *E. I. Commercial v. Collector of Customs*, A. 1960 Cal. 1 (5).

15. *Masalkhan v. Custodian*, A. 1959 M.P. 256.

16. *State of U. P. v. Nooh*, A. 1958 S.C. 86.

17. *Collector of Customs v. Rahiman*, A. 1957 Mad. 496; *Arthur v. Collector of Customs*, A. 1958 Ker. 357 (365); *Govind v. R. S. Commr.*, A. 1960 Raj. 177.

7. Where the order of a tribunal outside jurisdiction is a *nullity*, the High Court may restrain a person within jurisdiction from enforcing it.<sup>18</sup>

8. Where the tribunal has finished its work and become *functus officio*, that High Court has jurisdiction to issue *certiorari* against the order of that tribunal, within whose jurisdiction the records of the tribunal are in custody.<sup>19</sup>

9. There has been a difference of opinion between the Rajasthan<sup>20</sup> and Bombay<sup>21</sup> High Courts as to the effect of s. 59 (5) of the States Reorganisation Act, 1956 upon the jurisdiction of a High Court to which a proceeding is transferred under the provision. According to the Rajasthan<sup>22</sup> High Court, if the territory from which the case arose is within its jurisdiction, the High Court to which the proceeding is transferred shall have jurisdiction even though the authority who passed the impugned order has fallen under the jurisdiction of another High Court.

According to the Bombay<sup>21</sup> High Court, the above conclusion will hold good only in the case of a proceeding for *certiorari* where jurisdiction follows from the custody of the record; once the record is brought before a High Court, it is entitled to quash the impugned judicial or quasi-judicial record. But the provision of the States Reorganisation Act would not enable a High Court to issue a writ, say, of *mandamus*, against a Government which is outside its territorial jurisdiction. Thus, though the Bombay High Court may have received a proceeding by transfer under the Act, it cannot issue a writ against the State of Madhya Pradesh.<sup>21</sup>

10. Where there is absence of territorial jurisdiction according to the foregoing jurisdiction, waiver<sup>23</sup> or consent<sup>24</sup> of the parties cannot confer jurisdiction upon a High Court to issue a writ.

#### No notice required under s. 80, C. P. Code.

A proceeding under Art. 226 not being a suit, the provisions of s. 80, C. P. C. are not attracted to it.<sup>25</sup>

#### Application and Affidavit.

1. In the absence of Rules framed under Art. 226, an application must be drawn in conformity with the provisions of the Civil Procedure Code relating to pleadings, as far as possible.<sup>26</sup> The application should contain in a concise form the material facts on which the party relies for his claim. Arguments should not form part of the application.<sup>27</sup>

(i) The application must state precisely the act to be done or forborne by the respondent.<sup>1</sup>

(ii) The right of the applicant which has been affected by the act or omission of the respondent, the nature of the respondent's duty, and the fact of demand and refusal must be stated in the application.<sup>1</sup> If there has been any apparent delay, sufficient explanation of the delay must be given in the application.<sup>2</sup>

18. *Punjab Sugar Mills v. State of U. P.*, A. 1960 All. 444.

19. *Hari Vishnu v. Ahmed*, A. 1955 S.C. 233 : (1955) 1 S.C.R. 1104.

20. *Jaswant Singh v. Asstt. Judge*, A. 1958 Raj. 124 (126).

21. *Surjuprasad v. State of M. P.*, A. 1959 Bom. 122 (124).

22. *Lakshmi v. Collector*, A. 1955 Andhra 178.

23. *Vishakhapatnam C. M. T. Society v. Subba Rao*, A. 1955 Andhra 175.

24. *Cosmopolitan Club v. Deputy Commercial Tax Officer*, A. 1952 Mad. 814.

25. *Kishori Lal v. Dy. Commr.*, A. 1955 Assam 183 (195).

1. *Khagendra v. D. M.*, A. 1951 Cal. 3.

2. *Ratan v. Adhar*, A. 1952 Cal. 72 (73).

3. *Sikri Bros. v. State of Punjab*, A. 1957 Punj. 220.



(iii) Questions of fact should be raised in the Petition at the first available occasion,<sup>4</sup> and the Petition cannot be allowed to be amended so as to give it a new and altogether different complexion.<sup>5</sup>

2. (a) The allegations in the application must be supported by affidavit and should be similarly answered by an affidavit in opposition by the respondent; a copy of the affidavit in opposition should be furnished to the applicant in good time before the date fixed for hearing and the applicant will also be at liberty to use a reply, also furnishing copies to the respondent.<sup>6</sup>

(b) The affidavit must be that of the applicant himself.<sup>7</sup> An affidavit of an agent or employee is not in order.<sup>8</sup>

(c) The affidavit should be confined to statements of facts and should not be used as vehicles of argument.<sup>9</sup> An affidavit which is not in conformity with O. 19, r. 3 of the C. P. Code is liable to be rejected, unless the defect can be cured by giving the Petitioner an opportunity to swear a fresh affidavit, clarifying the defect.<sup>10</sup>

(d) The affidavit must be sworn by the person in whose knowledge the facts are. Where the facts are within the knowledge of a Government official, he should not send his clerk to swear the affidavit.<sup>11</sup>

3. An averment in the application which is not traversed by the respondents by a counter-affidavit must be taken to have been admitted.<sup>12</sup> Where the respondents do not file a counter-affidavit, there is no opposition to the petition and the return of the respondents need not be taken into consideration.<sup>13</sup>

4. On the other hand, no relief can be asked for on the basis of incidental statements made by the respondent in his reply.<sup>14</sup> If any new plea arises from the reply of the respondent, it should be squarely raised and further time given to the other side.<sup>15</sup>

#### **If any new point may be raised at the hearing.**

1. The general rule is that a ground which has not been specifically taken in the application or the return shall not be allowed to be urged at the hearing.<sup>16,17</sup>

To this general rule an exception is made in respect of—  
Grounds based on facts which are clearly on the record.<sup>18</sup>

2. A Petitioner should not be permitted to raise a question which depends on facts which were not mentioned in his petition but were put forward in a rejoinder to which the respondents had no opportunity to reply.<sup>19</sup>

4. *Shivanandan v. State of W. B.*, A. 1954 Cal. 60.

5. *Sohan Singh v. State of Pepsu*, A. 1955 Pepsu 1 (F.B.).

6. *Khudiprasad v. State of W. B.*, A. 1952 Cal. 798.

7. *Saradish v. Municipal Commrs.*, A. 1956 Cal. 456.

8. *Tropical Ins. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519).

9. *Shiv Dayal v. State of U. P.*, A. 1953 All. 684.

10. *Bezbaruha v. State of Assam*, A. 1954 Assam 161 (164).

11. *Moinuddin v. Divisional Engineer*, A. 1959 All. 795.

12. *Nimar Cotton Press v. S. T. O.*, A. 1956 Nag. 27 (31); *Lokesh v. Commr.*, A. 1956 All. 147.

13. *Mahendra v. State of M. B.*, A. 1953 M.B. 236.

14. *Khondewal v. State of U. P.*, A. 1955 All. 12.

15. *Tropical Ins. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519).

16. *Karamdeo v. State of Bihar*, A. 1956 Pat. 228 (231).

17. *Nagpur Corpn. v. N. E. L. & P. Co.*, A. 1958 Bom. 498 (506).

18. *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (412).

### Who may apply under Art. 226.

The rights that can be enforced, under Art. 226, must ordinarily be the rights of the Petitioner himself, except in the case of *habeas corpus*<sup>19</sup> [see p. 192, *ante*] and *quo warranto*<sup>20</sup> [see *post*].

In other words, the right which is the foundation of an application under Art. 226 is a personal and individual right.<sup>21</sup> Hence, the nomination made by the Governor under Art. 171 (3) (e) and (5) cannot be challenged under Art. 226 by an elected member of the Legislative Assembly on the ground that it is unconstitutional, for it cannot be said that any personal right of the applicant has been infringed even indirectly, by the nomination.<sup>22</sup>

### Parties.

1. A writ under Art. 226 cannot be issued against a person who is not impleaded as an opposite party to the proceeding.<sup>23,24</sup> and none other than those who are parties would be bound by an order made in the proceeding.<sup>24</sup>

2. An application under Art. 226 is not a regular suit and only persons or bodies against whom relief is sought are necessary parties. Merely because certain questions will have to be determined incidentally in giving or not giving the reliefs asked for the application does not make each and every person interested in such questions necessary parties to such a proceeding.<sup>25</sup> Thus, a landlord whose property has been notified under an Estates Abolition Act may apply for a writ against the Government on the ground that the property is not an 'estate,' without impleading the ryots even though they would be indirectly affected by the decision.<sup>26</sup> But where the relief sought cannot be granted without making a person party to the application, he is a necessary party.<sup>24</sup>

Thus,—

(a) When an order of a tribunal or other authority is sought to be set aside, such tribunal or authority as well as the person who is interested in the order should be impleaded.<sup>2</sup> Where the original order has become merged in the order of an Appellate Authority, the latter should be impleaded.<sup>2</sup>

(b) But where the validity of a tax imposed by a local Authority is challenged, the State is not a necessary party.<sup>2</sup>

(c) The Election Commission is not a necessary party to quash the proceedings of an Election Tribunal. The Election Tribunal is the proper party to an application for *certiorari* even where the Tribunal has become *functus officio*,<sup>2</sup> the object of the writ being merely to

19. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 : (1950-51) C.C. 10.

20. *Karkare v. Shevde*, A. 1952 Nag. 330.

21. *In re Ramamoorthi*, (1952) II M.L.J. 671 : A. 1953 Mad. 94. [In this case, however, relief was barred by Art. 361].

22. *Purushottam v. State of U. P.*, A. 1955 All. 106.

23. *Bimal Chandra v. Chairman*, A. 1954 Cal. 285.

24. *Bhagwati v. Lal Bahadur*, A. 1955 All. 422 (423).

25. *Samarendra v. Calcutta University*, A. 1953 Cal. 172.

1. *Rajagopal Rao v. State of Orissa*, A. 1950 Orissa 214.

2. *Sundaram v. State of Madras*, (1955) I M.L.J. 235.

3. *Amarendra v. Narendra*, A. 1953 Cal. 114.

4. *Makhan Lal v. Chatterjee*, A. 1954 Cal. 208.

5. *Mandir Thakar Dawara v. State*, A. 1955 Pepsu 159; *Devchand v. Dhanraj*, A. 1949 Mad. 53.

6. *Badrul v. Custodian of Evacuee Property*, A. 1957 M.P. 32.

7. *Kandol v. Chief Officer*, A. 1954 Kutch 50.



quash the offending order. Where, however, the writ sought is against the record, the authority who has the custody of the record should be impleaded.<sup>8</sup>

(d) Where the writ relates to a right, title or interest in real property, all persons owning or claiming the same should be joined as parties.<sup>9</sup>

(e) When an order which is sought to be quashed was confirmed by an appellate authority, it is necessary to implead both the original and appellate authorities.<sup>10</sup> Where, however, the order of the original authority is a nullity on the ground of want of jurisdiction, non-joinder of the appellate authority would not be a bar to relief.<sup>11</sup>

(f) Where the *vires* of a Central Act is challenged but no relief is sought against the Central Government, the Union of India need not be impleaded as a party. It will suffice if notices of petition are served upon the Attorney-General and the Advocate-General.<sup>12</sup>

3. Where the relief sought is against a statutory body bearing an official designation, the proper course is to implead the body in its official designation and not the members holding office for the time being, individually.<sup>13</sup>

#### Addition of necessary parties.

1. It follows from the above, that a rule *nisi* may be amended with a view to adding a necessary party. Such amendment should ordinarily be allowed only upon notice to the party proposed to be added. There is, however, no bar to an *ex parte* order being made in proper cases. Upon such amendment being effected, directions should be given for the use of affidavits or additional affidavits.<sup>14</sup>

2. As a general rule, a defect of party is allowed to be removed at any time before the Rule is made absolute and the writ issued, in order to avoid multiplicity of proceedings. Thus, where the Petition was against the Secretary of the Secondary Education Board, but at the hearing the position of the Secretary appeared to be doubtful, the Court allowed the Board itself to be made a party, by amending the petition, on payment of costs and directed a copy of the Rule to be served on the Board itself.<sup>15</sup>

3. If a necessary party or party likely to be affected by a writ or a party whose presence may be necessary to make the writ effective is not before the Court, the Court may, either upon an application made for that purpose, or of its own motion, direct that such a party be added and the rule *nisi* served upon him, or simply that the rule *nisi* be served upon him or even that he may be allowed to be present at the hearing. In any such case, such party would be entitled to show cause or support or oppose a cause already shown.<sup>16</sup>

The Supreme Court directed a Labour Union to be made a party respondent (on its own application) to a petition under Art. 226 brought by an employer against the Industrial Tribunal and the Government for quashing an order of reference of a dispute to the Tribunal on the ground that the dispute referred to was covered by a pending award and that the order was vitiated by *mala fides*.<sup>17</sup>

8. *Hari Vishnu v. Syed Ahmad*, (1952-54) 2 C.C. 480 (483).

9. *Makhan v. Chatterjee*, A. 1954 Cal. 208 (210).

10. *Naziruddin v. Lawale*, A. 1956 Nag. 65.

11. *Sastri v. Pravalavarna*, A. 1956 Mad. 146.

12. *Hussain v. Durgah Committee*, A. 1950 Raj. 175 (191).

13. *Radha Films v. W. B. Board of Censors*, A. 1952 Cal. 653.

14. *Makhan v. Chatterjee*, A. 1954 Cal. 208 (210).

15. *B. I. Corpn. v. Industrial Tribunal*, A. 1957 S.C. 354 (357).

### Whether joint petition lies.

1. The general rule is that two or more persons cannot join in a single petition for a writ to enforce separate claims. There must be separate applications for separate writs, even though the several applicants are successors in the office in respect of which claims arise,<sup>16-17</sup> or that the Petitioners are affected by orders of a similar nature.<sup>18, 19</sup> Separate applications must be made to quash separate orders.

2. The case would be different where injury to a class of persons is done by a common order<sup>21</sup> or law.<sup>20</sup> But even in this case, separate applications should be made if the interests of the applicants in the subject matter are different and distinct.<sup>21</sup>

### Power to dismiss application in limine.

1. Though the High Court possesses the power to dismiss an application under Art. 226 *in limine*, when it discloses no substance, the power should be cautiously used. Thus, where there are allegations of *mala fides* against the Government, the High Court should not dismiss the application without a hearing on this point. The Supreme Court would, in such cases, interfere under Art. 136.<sup>22</sup>

2. Nor should the High Court reject an application *in limine*, where it *prima facie* appears that a fundamental right has been infringed, merely because evidence has to be taken on some disputed question of fact.<sup>23</sup>

### Applicability of the C. P. Code.

Once the proceeding under Art. 226 is held to be a civil proceeding, s. 141 of the C. P. Code would be attracted to it.<sup>24</sup> In the result, the following provisions, *inter alia*, would be applicable:

(i) O. 1, r. 1 as to joinder of petitioners.<sup>25, 26</sup>

But the mere fact that similar orders were passed in the case of other individuals also by the same authority does not mean that the injury caused is a common injury so as to justify a joint petition.<sup>1</sup>

16. Halsbury, 2nd Ed., Vol. 9, Para. 1325, p. 783.

17. *Biswaranjan v. R. K. Mission*, A. 1958 Pat. 653 (654).

18. *Ibrahim v. Dy. C. T. O.*, A. 1956 Mad. 628.

19. *In re Gopalakrishnarao*, A. 1957 Andhra 88; *Mandir v. State of Pepsu*, A. 1955 Pepsu 159; *Baukim v. Commr.*, A. 1958 Pat. 314 (319).

20. *United Motors v. State of Bombay*, (1952) 55 Bom. L.R. 246 (question not raised on appeal in *State of Bombay v. United Motors*, (1953) S.C.R. 1069).

21. *Rainbow Dyeing v. Industrial Tribunal*, (1959) 1 M.L.J. 53; *Uma Shankar v. Divisional Supdt.*, A. 1960 All. 366.

22. *B. I. Corp. v. Industrial Tribunal*, A. 1957 S.C. 354 (356) : (1956) S.C.R. 154.

23. *Cf. Kochunni v. State of Madras*, A. 1959 S.C. (p. 194, ante).

24. *Adnarayana v. State of A. P.*, A. 1958 A.P. 16; *Manindra v. Baranagore Municipality*, A. 1956 Cal. 291; *Qurabali v. Govt. of Rajasthan*, A. 1960 Raj. 152 (159).

25. The Allahabad High Court [*Uma Shankar v. Divisional Superintendent*, A. 1960 all. 366] differs on the ground that the jurisdiction under Art. 226 is a special jurisdiction to which the technical rule of the C. P. C. should not be imported].

1. *Ibrahim v. Dy. Commercial Tax Officer*, A. 1956 Mad. 626.



(ii) O. 1, r. 8, so that the petition can be brought against some of the persons in their representative capacity, where the opposite parties are large in number.<sup>2-3</sup>

### Whether evidence can be taken in a proceeding under Art. 226.

1. In a number of cases it has been held by the High Courts<sup>4</sup> as well as by the Supreme Court<sup>5</sup> that an application under Art. 226 is to be determined on admitted facts or on facts established by affidavits, and that the Court cannot take evidence to determine disputed questions of fact.

2. But the Supreme Court has recently held<sup>6</sup> that in a proceeding under Art. 32, the Court is not debarred from determining disputed questions of fact by taking evidence [p. 194, *ante*] inasmuch as fundamental rights are affected. It follows that the same principle should apply to those proceedings under Art. 226 where *fundamental rights* are involved.

### Relief not available in a proceeding under Art. 226.

Though it has been held that the power of the High Court under Art. 226 is not confined to the grant of 'prerogative writs' only, it must not be supposed that any kind of relief is available in a proceeding under Art. 226. Thus,—

(i) The power of issuing writs should not be utilized for giving what is in essence a *declaratory* relief,<sup>7-8</sup> e.g., that a decree has become null and void owing to certain provisions of the Constitution;<sup>9-10</sup> or merely that an Act is *ultra vires*. Of course, a finding that an Act is *ultra vires* may be necessary in order to give the Petitioner the proper relief in the proceeding.<sup>10,11</sup>

(ii) A decree for money<sup>6</sup> is not available in a writ proceeding.

(iii) Interim relief cannot be given in a proceeding so as to completely dispose of the proceeding without finally determining the rights of the parties in question in the proceeding. Where the Court refuses to determine the rights of the parties in the proceeding, the Court cannot grant any interim relief, e.g., to maintain the *status quo*, merely because the aggrieved party cannot institute a suit until after the expiry of two months from the date of notice under s. 80 of the Civil Procedure Code and, in the meanwhile, unless protected by the Court the applicant may suffer irreparable loss.<sup>12</sup>

2. *Bijoy Ranjan v. Das Gupta*, A. 1953 Cal. 289.

3. The contrary decision in *Ibrahim v. Dy. Commercial Tax Officer*, A. 1956 Mad. 626, it is submitted, does not appear to be sound.

4. *Ganesh v. State of W. B.*, 1958 Cal. 114 (117); *University of Calcutta v. Somesh*, A. 1958 Cal. 131 (134); *Tejraj v. State of M. B.*, A. 1958 M.B. 115 (122); *Bombay Business House v. Venkatesan*, (1958) 60 Bom. L.R. 1058 (1060).

5. *Sohan Lal v. Union of India*, A. 1957 S.C. 529; *Union of India v. Varma*, A. 1957 S.C. 882.

6. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

7. *Chettiar Farm v. Kaleeswarar Mills*, A. 1957 Mad. 309 (312).

8. *Dalel v. Co-operative Union* A. 1956 All. 43 (46); *Prabha v. State of M. B.*, A. 1955 M.B. 20.

9. *Chitranjit Lal v. Union of India*, (1950-51) C.C. 10 (13); *Sheshankar v. State of M. P.*, A. 1951 Nag. 58 (66).

10. *Anumati v. A. R. C. P.*, A. 1953 Cal. 187.

11. Cf. *Kochunni v. Madras*, A. 1959 S.C. 725, at p. 194, *ante*.

12. *State of Orissa v. Madangopal*, (1952) S.C.R. 21 : (1950-51) C.C.

(iv) An order in the nature of temporary injunction cannot be issued under Art. 226 for the purpose of facilitating the institution of a suit.<sup>12</sup>

(v) An order for refund of tax cannot be given in a proceeding under Art. 226.<sup>13</sup>

(i) The object of the proceedings for *mandamus*, *prohibition* or *certiorari* is to quash the order complained of or to restrain the authority from acting without jurisdiction (or the like). Hence, in none of the proceedings will the Court make an order of its own in substitution of the order complained of. In short, in neither of these proceedings, will the Court act as a court of appeal<sup>14</sup> (see *post*).

But where the discretion of the inferior tribunal or authority is circumscribed by any statutory provisions, a direction in the nature of *mandamus* may be issued, even in a proceeding for *certiorari*, requiring the authority to make a fresh order complying with the requirements of the law.<sup>15</sup>

### Appeal.

1. It has been held by the Allahabad,<sup>16</sup> Andhra,<sup>17</sup> Bombay,<sup>18</sup> Calcutta,<sup>19</sup> Madras<sup>20</sup> and Nagpur<sup>21</sup> High Courts that appeal lies to a Division Bench from the order of a Single Bench deciding an application under Art. 226.

But the Division Bench should not interfere with the exercise of discretion by the Single Judge unless it is clearly satisfied that the exercise of the discretion has been erroneous or improper.<sup>17, 19</sup>

2. Nevertheless, the Supreme Court would entertain direct appeal on the certificate of a Single Judge, under Art. 132(1).<sup>22</sup>

3. From the decision of the High Court under Art. 226, appeal lies to the Supreme Court under Arts. 132-6.<sup>23, 24</sup>

4. It has been already pointed out (p. 192, *ante*), that where fundamental rights are infringed, the unsuccessful Petitioner may, instead of appealing from the order under Art. 226, make a fresh application to the Supreme Court direct under Art. 32, but such applications would not be encouraged unless good grounds are shown.<sup>1</sup> Sometimes the Court would treat such application as an appeal.

### Appeal from order under Art. 226 and O. 45, r. 13 of the C. P. Code.

There has been a difference of opinion as to whether a High Court can exercise powers under O. 45, r. 13 in the matter of staying the operation of an order made under Art. 226, pending disposal of an application for leave to appeal to the Supreme Court against the order.

13. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (246); *Union of India v. Kamath*, A. 1957 Mad. 110; *Usman v. State of Mysore*, A. 1960 Mys. 93 (94); *Radheshyam v. Union of India*, A. 1960 Bom. 353 (361).

14. *Veerarappa v. Raman*, A. 1952 S.C. 192 (195-6).

15. *Mahaboob v. Mysore S. T. A.*, A. 1960 S.C. 321 (327).

16. *Aidal Singh v. Karan Singh*, A. 1957 All. 414 (F.B.).

17. *State of Andhra v. Collector*, A. 1958 A.P. 140 (141).

18. *Cf. Caltex v. Fernandez*, A. 1957 S.C. 326 (328).

19. *Budge Budge Municipality*, (1952) 57 C.W.N. 25.

20. *Ramayya v. State of Madras*, A. 1952 Mad. 300.

21. *Cf. N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232 (234).

22. *Dy. Commercial Tax Officer v. Cosmopolitan Club*, A. 1954 Mad. 1144.

23. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

24. *Cf. Manager, Hotel Imperial v. Chief Commr.*, A. 1959 S.C. 1211 [Art. 133 (1) (a), (c)].

25. *Cf. Sarupchand v. Union of India*, A. 1959 S.C. 1207 [Art. 136].

1. *M. K. Gopalan v. State of M. P.*, A. 1954 S.C. 362



A. A Division Bench of the High Court of Allahabad<sup>1</sup> has held that there is nothing in O. 45, r. 13 to exclude its operation where the appeal is from an order made under Art. 226 of the Constitution, and an application for leave to appeal to the Supreme Court is *pending* before the High Court. Of course, the Court ceases to have such power after the application for leave is disposed of.<sup>2,4</sup>

The authority of the above decision of the Allahabad High Court<sup>1</sup> has been shaken by a later Division Bench<sup>2</sup> where Desai J. has held that the High Court has no power to stay the operation of its order under Art. 226 even when an application for leave to appeal against such order is pending, either under O. 45, r. 13, C. P. C. or under any other law. Beg J., however, held that the High Court can make such order under its inherent powers, without referring to the provisions of O. 45, r. 13.<sup>1</sup>

B. The High Court of Madras<sup>4a</sup> has held that O. 45, r. 13 does not empower the Court to restrain the successful party from exercising his rights under the final order.

### Review.

1. The Madras High Court<sup>4b</sup> has held that an order dismissing an application for *certiorari* is liable to review on such grounds as are specified in O. 47, r. 1 of the Code of Civil Procedure.

2. It has also been held that an order of *mandamus*, in the nature of an interlocutory order, may be reviewed, in exercise of the inherent power of the Court, on the ground of a change in the law.<sup>5</sup>

3. But as regards *habeas corpus*, the Madras High Court<sup>6</sup> has held that this proceeding being of a criminal nature, no review is available.<sup>8</sup>

### Res Judicata : Whether second application lies.

1. There is nothing in the Constitution to bar a second application under Art. 226, where the previous one was rejected on a preliminary ground,<sup>7</sup> e.g., that the Petitioner had no *locus standi*,<sup>9</sup> or on the ground that it was premature.<sup>9</sup>

2. But grounds available in the previous application cannot be allowed to be taken in the subsequent application<sup>10,11</sup> as the principle of *res judicata* would apply.<sup>12</sup>

### Non-compliance with writ.

Non-compliance with a writ or order issued under Art. 226 constitutes contempt<sup>1, 11</sup> of Court.

1. *Girja v. Dudhi*, A. 1955 All. 589 (591).

2. *State v. Mukhtar Singh*, A. 1957 All. 505 (519, 526).

3. *Purna v. Chandra*, A. 1954 Orissa 114.

4. *Jhendra v. State of Assam*, A. 1953 Assam 159.

4a. *Rajahmundry E. S. C. v. State of Madras*, A. 1953 Mad. 475 (476).

4b. *Chenchamma v. P. S. Transport*, A. 1953 Mad. 39.

5. *Asstt. Settlement Officer v. Muthiah*, A. 1960 Mad. 177.

6. *In re Venkateswara*, A. 1951 Mad. 611.

7. *Mohichandra v. Secy., Local Self-Govt.*, A. 1953 Assam 12.

8. *Bhagwati v. Govt. of U.P.*, A. 1959 All. 589 (592).

9. *Surapkumar v. Chatni*, A. 1956 Punj. 157.

10. *Maganlal v. Govt. of Bombay*, A. 1953 Assam 61.

11. *In re Venkateswara*, A. 1951 Mad. 611.

12. *Radhashyam v. Patna Municipality*, A. 1956 Pat. 182.

**Cl. (1): 'Including writs . . . .'**

These words in Art. 32 (2) (p. 190, ante) and in Art. 226 (1), indicate that the powers of the Supreme Court or the High Court under these articles is not confined to issuing prerogative writs only.<sup>13</sup> The present Article, thus, vests the High Courts with all the powers of the English High Court of Justice to issue the prerogative writs under the Common Law<sup>14</sup> and something more,<sup>15</sup> irrespective of what is laid down in s. 491 of the Cr. P. Code or s. 45 of the Sp. Rel. Act.

The words 'directions, orders . . . .' in Arts. 32 (1) and 226 (1) empower the Supreme Court as well as the High Courts to issue directions or orders in the nature of *habeas corpus* etc., even though such directions may not strictly conform to any of the writs as they are known at English common law, provided the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law are observed.<sup>16</sup>

Thus, the Court may give a direction to a State Government prohibiting it to enforce a restraint order against the petitioner, though internment may not, strictly speaking, be 'detention' for purpose of a writ of *habeas corpus* and though the order of prohibition is not the same as *habeas corpus*.

Holding that the rights of the Petitioners under certain contracts were not 'proprietary rights', and that, accordingly, the State had no right to have such rights transferred to itself under the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, a writ was issued prohibiting the State Government from interfering in any manner with the enjoyment of the aforesaid rights of the Petitioners in exercise of the powers conferred by the said Act.<sup>17</sup> When fundamental rights are affected, the Court can even make a declaratory order if that is the proper relief to be given to the aggrieved party.<sup>18</sup>

**'Throughout the territories to which it exercises jurisdiction'.**

The present Article confers power to issue the writs,—irrespective of what powers the High Court had prior to the Constitution,—throughout the limits of the entire territory over which the High Court exercises its jurisdiction,—*original or appellate*.<sup>19</sup> In short, the object of Art. 226 is to remove the fetters that were imposed by such legislation as s. 491 of the Cr. P. C. and s. 45 of the Specific Relief Act upon the power of the High Courts to issue the prerogative writs and to place all the High Courts of India at par with one another.<sup>20</sup>

But wide as are the powers thus conferred, a two-fold limitation is placed upon its exercise—(a) the power is to be exercised 'throughout the territories', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction; (b) the person or

13. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566 (572); (1950-1) C.C. 61 (63).

14. *In re Prahlad Krishna*, A. 1951 Bom. 25 (F.B.); *Election Commn. v. Saka Venkata* (1953) S.C.A. 20.

15. *Walker v. Kshilish*, (1952) 55 C.W.N. 423 (427).

16. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

17. *Chholabhai v. State of M. P.*, A. 1953 S.C. 108 (III).

18. *Kochunni v. State of Madras*, A. 1959 S.C. 725.

19. *Srinivasa v. State of Madras*, A. 1951 Mad. 70 (S.B.); *Union of India v. Elbridge*, A. 1952 Cal. 601.

20. *Sheosankar v. M. P. State*, A. 1951 Nag. 58 (P.B.).



authority to whom the High Court is empowered to issue such writs must be 'within those territories,' which clearly implies that they must be amenable to its jurisdiction either by *residence* or *location* within those territories.<sup>21</sup>

[See pp. 359-362, *ante*].

#### 'To any person.'

1. These words mean to any person to whom according to well-established principles, the writs lay.<sup>22,23</sup>

2. When a person's fundamental right is infringed by a private person, his remedy lies by an action under the ordinary law and not by a writ<sup>24</sup> [see p. 19, *ante*].

3. 'Person' includes 'any company or association or body of individuals, whether incorporated or not' (s. 3 (39), General Clauses Act, 1897). Hence, a writ under Art. 226 can be issued against bodies like a State Medical Faculty,<sup>25</sup> the Syndicate of a University or the University itself.<sup>1</sup>

#### 'Any person or authority.'

This expression is wide enough to include all Courts and tribunals situated within the territorial jurisdiction of the High Court, whether such Courts or tribunals are subject to the *appellate* jurisdiction of the High Court or not.<sup>2</sup>

#### Jurisdiction extends over final as well as interlocutory orders.

Art. 226, unlike Arts. 132-6, is not limited to 'final orders'. It extends to interlocutory orders also;<sup>3</sup> of course, whether the High Court would interfere at the interlocutory stage has to be considered by the Court according to the circumstances of each case, before exercising its discretionary power.<sup>4,5</sup>

#### Whether writ lies against the High Court itself.

The High Court, acting in its judicial capacity, cannot be said to be an authority subject to the jurisdiction of the High Court itself, under Art. 226<sup>6</sup>

But when the High Court or any of its Judges acts in an administrative capacity, a writ under Art. 226 shall lie against such decision or order, e.g.,—

(a) When the High Court takes disciplinary proceedings against a member of its staff.<sup>6</sup>

(b) Where the High Court refixes the seniority of subordinate judicial officers.<sup>1</sup>

(c) Where a High Court Judge acts as Industrial Tribunal.<sup>7</sup>

21. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

22. *Carlsbad Co. v. Jagtiani*, A. 1952 Cal. 315 (218).

23. *Indian Tobacco Corpn. v. State of Madras*, A. 1954 Mad. 549.

24. *Shamdasani v. Central Bank*, A. 1952 S.C. 59.

25. *B. C. Dasgupta v. Bejoy*, (1952) 56 C.W.N. 861.

1. *Jagdish v. University of Punjab*, A. 1952 Punj. 395; *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 861.

2. *Molliol v. State*, A. 1952 All. 963 (966).

3. *Muthiah v. Ganesan*, (1958) 1 M.L.J. 110.

4. *Ibid.*, (1958) 2 M.L.J. 237 (240).

5. *Devasabayam v. State of Madras*, A. 1958 Mad. 53 (68).

6. *Cf. Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1352).

7. *In re Hayles*, A. 1955 Mad. 1 (F.B.).

**'Any Government within those territories.'**

—See pp. 360—362, *ante*.

**'For any other purpose.'**

1. These words make the jurisdiction of the High Court to issue the writs more extensive than that of the Supreme Court inasmuch as these words are absent from Art. 32, and the Supreme Court may have the power for 'other purpose' only if such power is conferred by legislation (Art. 139). But Art. 226 confers upon the High Court power to issue the writs for the enforcement of Fundamental Rights as well as for 'other purposes'.

2. 'Other purpose' means any purpose other than enforcement of Fundamental Rights, i.e., the enforcement of some other legal right or the performance of some legal duty.<sup>8</sup> It thus includes the other purposes for which such writs or orders were available before the commencement of the Constitution or at English Common law.<sup>9,10</sup> Where the Court refuses to enter into the question whether there is any such right, it cannot issue a writ under Art. 226.<sup>11</sup> Art. 226 does not authorise the Court to interfere in the matter of purely political rights.<sup>12</sup> It also follows that no writ under Art. 226 is available where the Petitioner fails to establish a legal right belonging to himself.<sup>13</sup>

3. 'Any other purpose' means a purpose for which any of the writs could, according to well-established principles, issue. The words can hardly mean that the High Court can issue the writs for any purpose it pleases.<sup>9</sup> The object including the power to issue the writs 'for any other purpose' is to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.<sup>10</sup>

4. The object of Art. 226 is not to supplant the ordinary right of action or the remedy prescribed by the ordinary law of the land.<sup>14</sup>

5. On the other hand, it would appear from the observations of the Supreme Court in *Kochunni v. State of Madras*<sup>15</sup> that where fundamental rights have been affected, the High Court, like the Supreme Court, would not be lacking power to decide disputed facts on taking evidence, as in an original action, and even make a declaratory order, where that is the proper relief to be given to the aggrieved party.

## HABEAS CORPUS

### Habeas Corpus, nature of.

It is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment.

### When habeas corpus does not lie.

1. If it appears on the face of the return that a person is in

8. *Bagaram v. State of Bihar*, A. 1950 Pat. 387; *Ramprasad v. State of Bihar*, A. 1952 Pat. 194 (200).

9. *Emp. v. Jesinghbal*, A. 1950 Bom. 363; *Carlsbad v. Jagtiani*, A. 1952 Cal. 315; *Karkare v. Shevde*, A. 1952 Nag. 330 (334).

10. *Election Commn. v. Saka Venkata*, (1953) S.C.R. 1144.

11. *State of Orissa v. Madan Gopal*, A. 1952 S.C. 12.

12. *In re Ramamoorthi*, A. 1953 Mad. 94.

13. *Barua v. State of Assam*, A. 1956 Assam 81.

14. *Parraju v. B. N. Ry.*, A. 1952 Cal. 610; *Bagaram v. State of Bihar*, A. 1950 Pat. 387; *Indian Sugar Mills v. Govt. of U. P.*, A. 1951 All. 1; *Muthia v. Commr. of I. T.*, A. 1951 Mad. 204.

15. *Kochunni v. State of Madras*, A. 1959 S.C. 725.



detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for *habeas corpus*. Assuming that in such cases it is open to investigate the jurisdiction of the Court which convicted the Petitioner, the mere fact that the trial Court had acted without jurisdiction would not justify interference by *habeas corpus*, if the conviction had been upheld on appeal by a Court of competent jurisdiction; for the appellate court is fully competent to decide whether the trial was with or without jurisdiction and it has jurisdiction to decide that question rightly as well as wrongly. Where the appellate court wrongly holds that the trial Court had jurisdiction, it cannot be said to have acted without jurisdiction and the order of the appellate court cannot be treated as a nullity.<sup>16</sup>

2. In *habeas corpus* proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceeding. Hence, if a fresh and valid order justifying the detention is made by the time of the return to the writ, the Court cannot release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.<sup>17</sup>

3. When physical restraint is put upon a person under a law there is no right to *habeas corpus* unless the law is unconstitutional<sup>18</sup> or the order is *ultra vires* the statute.<sup>19</sup> But the Petitioner is entitled to challenge the constitutionality of the law in the *habeas corpus* proceeding and the Court is bound to release him if the law is held to be unconstitutional.<sup>20</sup>

4. Under Art. 226, a petition for *habeas corpus* would lie not only when a person is detained by the State but also when he is detained by another private individual, but no petition under Art. 32 would lie in the latter case, because Art. 32 does not apply unless a 'fundamental right' has been infringed<sup>21</sup> (see p. 191, *ante*).

5. Where no confinement or physical restraint has been imposed on the Petitioner apart from mere surveillance by the Police.<sup>22</sup>

#### Cases where *habeas corpus* has been issued since the commencement of the Constitution.

The amplitude of the Court's power to issue the writ of *habeas corpus* against the Government under the Constitution will be evident from the following review of the important cases in which the writ has been issued since the commencement of the Constitution :

##### (A) Preventive Detention.

(i) Violation of Art. 22 : The cases in which the Court has interfered for violation of the provisions of Art. 22 have already been summarised under Art. 22, p. 133, *ante*).

(ii) Violation of Art. 21 : If the detention is not in strict conformity with the requirements of the law authorising the detention, the detenu is entitled to be released forthwith, on the ground of contravention of Art. 21.<sup>23</sup> Thus, *habeas corpus* has been issued for contravention of the following provisions of the Preventive Detention Act, 1950 :

16. *Janardhan v. State of Hyderabad*, (1951) S.C.R. 344.

17. *Naranjan v. State of Punjab*, (1952) S.C.R. 395 (401) : (1952-54) C.C. 311.

18. *State of Punjab v. Ajai Singh*, (1953) S.C.R. 254.

19. *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88.

20. *Cf. Gopalan v. State of Madras*, (1950) S.C.R. 88.

21. *Vidya Verma v. Shirmarain*, (1956) S.C.A. 357.

22. *Binia v. Chaturvedi*, A. 1953 All. 613.

23. *Ram Narayan v. State of Delhi*, (1953) S.C.R. 652.

(i) Failure to communicate the grounds to the detenu within a reasonable time, as required by s. 7.<sup>24</sup>

(ii) Where a detenu's case is considered by only two of the three members who constitute the Advisory Board constituted under s. 8 (2) of the Act.<sup>25</sup>

(iii) Failure to refer the detenu's case to the Board within the time fixed by s. 9 (1), even though the detenu may have been temporarily released under s. 14 (1).<sup>22</sup>

(iv) Where the period of detention was fixed in the initial order of detention.<sup>26</sup>

(v) Where the Government revoked a previous order of detention in conformity with the opinion of the Advisory Board, but by the same order, confirmed the detention under one of the sub-clauses of s. 3 (1) (a) of the Act.<sup>1</sup> The fact that the Advisory Board has considered the Petitioner's case and decided against him is no bar to *habeas corpus*.<sup>2</sup>

(B) *Arrest and detention in cases other than that of preventive detention :*

(i) Violation of Art. 21 : *Habeas corpus* has been issued where the detention is or has become invalid owing to the violation of the provisions of the law under which the Petitioner is purported to have been imprisoned, e.g.—

(a) Where a Court adjourned a proceeding under s. 344 of the Criminal Procedure Code without making an order of remand to custody as required by that Section.<sup>23</sup>

(b) Where a Jail Superintendent had, contrary to the Punjab Communist Detenus Rules, 1950, sent a detenu for trial by a Magistrate for a 'jail offence' after having himself punished the detenu for the same offence under those Rules.<sup>3</sup>

(c) Where the law under which the person has been arrested, is itself unconstitutional,<sup>4,5</sup> e.g.—

Where s. 46 (2) of the Income-tax Act, 1922 and s. 13 of the Bombay City Land Revenue Act, 1876, are challenged on the ground of being repugnant to Art. 14.<sup>6</sup>

### Detention by a private person.

1. There is no doubt that an application for *habeas corpus* would lie under Art. 226,<sup>7</sup> when a person is wrongfully detained by another private person, as distinguished from the State. But an application against a private person would not lie under Art. 32,<sup>8</sup> for, detention by a private person does not infringe any 'fundamental right'—Art. 21 being levelled only against detention by the Executive without legislative sanction.

2. But there is a conflict of judicial opinion as to the cases in which the writ may be available against a private person, under Art. 226.

A. Generally speaking, an application for *habeas corpus* will lie to restore a child to the person entitled to his or her custody, where the welfare of the child requires it,<sup>9</sup> and the applicant is a person interested

24. *State of Bombay v. Almarani*, (1951) S.C.R. 167.

25. *Kishorilal v. The State*, A. 1951 Assam 160 (170).

1. *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

2. *Ravinder v. Dt. Magistrate*, A. 1960 Punj. 332.

3. *Jagjit v. State of Punjab*, (1953) S.C.R. 744.

4. *Gopalan v. State of Madras*, (1950) S.C.R. 88.

5. *Ram Manohar v. Supdt.*, A. 1955 All. 193.

6. *Purshottam v. Desai*, (1955) 2 S.C.R. 887.

7. *Vidya Verma v. Shri Narain*, (1955) 2 S.C.R. 983 (986).

8. *Gopalji v. Shree Chand*, A. 1955 All. 28.



in the welfare of the child.<sup>9</sup> It will issue even where the child is not actually kept under physical restraint but is kept away from the person entitled to his or her custody, without any lawful authority.<sup>10</sup> But the Court will refuse to restore the child to the parent or other guardian where it would be against the welfare of the child.<sup>11</sup>

B. But in a case where the Guardians and Wards Act applies, there was a conflict of judicial opinion as to whether right to *habeas corpus* was barred by the statutory remedy. The Allahabad<sup>12</sup> High Court held that relief must be had only under that special Act, e.g., for the purpose of merely determining the rival claims of competing guardians.

But the Calcutta,<sup>13</sup> Madras,<sup>14</sup> Madhya Bharat<sup>15</sup> and Oudh<sup>16</sup> Courts have held that *habeas corpus* cannot be refused simply because another statutory remedy is available. It would issue where there is imminent danger to the health, safety or morals of the minor.<sup>17</sup>

The latter view has now the support of the Supreme Court,<sup>17</sup> viz. that the right to *habeas corpus* cannot be denied simply because the Petitioner has also a statutory remedy.

### Who may apply.

1. The Supreme Court has ruled<sup>18</sup> that where the person detained is, owing to the restraint, unable to make the affidavit, the application shall be accompanied by an affidavit of some other person, stating the reason why the person restrained is unable to make the affidavit himself. Thus, a mere friend<sup>19</sup> may, in such circumstances, make the application, but not an advocate, as such, without a power of attorney from the prisoner.<sup>20</sup>

2. But where the affidavit of the stranger does not indicate why an affidavit from the prisoner himself could not be filed, the application would not be entertained.

3. In the case of detention of a child or minor, the English principles have been followed<sup>21</sup> to hold that—

(a) The only person who is competent to move the Court in *habeas corpus* is one who is entitled either to the custody of the child or to represent the child legally.

(b) If, however, such a person is shown to be incapable of making, or unable to make, the application, or where no such person exists, a friend of the child is entitled to make an application, provided he satisfies the Court by an affidavit as to the aforesaid circumstances and also that he himself is interested in the welfare of the child. In no circumstances would the Court issue the writ at the instances of a person whose interest is adverse to that of the minor.

9. *Raj Bahadur v. Legal Remembrancer*, (1953) 57 C.W.N. 507.

10. *Bhola Nath v. Dt. Magistrate*, A. 1959 Punj. 236 (238).

11. *Haidari v. Javvad*, A. 1934 All. 271.

12. *Abraham v. Mahatoo*, 16 Cal. 487.

13. *Rama v. Nataraja*, (1948) 1 M.L.J. 125.

14. *Chandrakant v. Hiralal*, A. 1954 M.B. 43.

15. *Dy. Commr. v. Muhammad*, A. 1934 Oudh. 392.

16. *Sampath v. Govindammal*, (1952) Mad. 468.

17. *Gohar v. Suggi*, (1960) 62 Bom. L.R. 54 (57) S. C.

18. O. XXXV, r. 1 of the Supreme Court Rules (see p. 87, *post*).

19. *In re Rajadhar*, A. 1948 Bom. 334.

20. *Vidya Verma v. Shiv Narain*, (1955) 2 S.C.R. 983.

21. *Raj Bahadur v. Legal Remembrancer*, (1953) 57 C.W.N. 507

### Return to the Rule nisi.

1. Inasmuch as the return has to rebut the allegations of *fact* made in the application it should be supported by an affidavit of the person against whom the Rule has been issued.<sup>21</sup> But an affidavit may not be necessary if the person has been detained under orders of a Court.<sup>22</sup>

2. A return by an officer other than the respondent in the proceeding is not a compliance with the writ.<sup>23</sup>

### Scope of order.

The only object of the writ of *habeas corpus* is to release a person from illegal detention. It cannot be used either to punish the respondent or to afford reparation to the person wronged.<sup>24</sup>

### Costs in a proceeding for habeas corpus.

Under the Constitution, the remedy of *habeas corpus* being no longer confined within the bounds of s. 491, Cr. P. Code, there is no bar to awarding costs in a proceeding for *habeas corpus* as in England.

The Madras High Court has, however, held<sup>25</sup> that pending the framing of rules under Art. 226, the High Courts have no inherent jurisdiction to grant costs in criminal proceedings for *habeas corpus*.

Costs may be disallowed to the Petitioner where he fails on the merits but succeeds on a preliminary point.<sup>26</sup>

### Appeal from orders for habeas corpus.

1. The absolute immunity, which exists in England,<sup>27</sup> from appealability in the case of an order of release (*i.e.*, an order allowing an application for *habeas corpus*) does not exist in India.<sup>1</sup>

2. Under the *Constitution of India*, an appeal will lie against an order whether allowing or refusing the application for *habeas corpus*, as follows :

(1) If the case involves a constitutional question, there will lie an appeal to the Supreme Court, upon a certificate of the High Court to that effect under Art. 132 (1) of the Constitution.<sup>2</sup>

(2) Even where there is no constitutional question involved, appeal would lie under Art. 134 (1) (c), upon the certificate of the High Court.

But the certificate cannot be granted as a matter of course to imperil the liberty of a subject who has obtained an order of release from the High Court.<sup>3</sup> This can be done only if there is a substantial question of law of paramount public importance involved in the case.<sup>4</sup>

(3) If the proceeding is treated as of a civil nature, appeal will similarly lie under Art. 133 (1) (c).<sup>5</sup>

(4) The Supreme Court may grant special leave under Art. 136, to appeal from orders either refusing or allowing application for *habeas corpus*.<sup>6</sup>

### Refusal to give effect to order of habeas corpus.

1. To decline to give effect to an order of release passed on an application for *habeas corpus* amounts to contempt of court.<sup>7</sup>

21. *Ranjit v. State of Pepsu*, A. 1959 S.C. 843 (846).

22. *Kidar Nath v. State of Punjab*, A. 1960 Panj. 122 (124).

23. *In re Venkataraman*, (1950) 2 M.L.J. 186.

24. *State of Punjab v. Ajaib*, A. 1954 S.C. 10 (16).

25. Cf. Cr. Vol. II, p. 86.

1. *Punjab Prosecutor v. Gopalan*, A. 1953 Mad. 66 (70).

2. *Tarapada v. State of West Bengal*, (1951) S.C.R. 212.

3. *State of Bombay v. Almarani*, (1951) S.C.R. 167.

4. *State v. Somnath*, A. 1953 Orissa 33.



2. Not only the refusal to give effect to an order of release, but any wilful interference with the exercise of the powers of the High Court under its *habeas corpus* jurisdiction amounts to contempt. Thus, where an application by a detainee to the High Court in respect of the withdrawal of certain privileges by the Government is withheld, the officer responsible for the impediment or unreasonable delay, must be liable for contempt.<sup>5,6</sup>

3. Not only a refusal to comply with an order of release but any attempt to circumvent the order by resorting to *fraudulent* proceedings, would constitute contempt.<sup>7</sup> But if an authority, after the order of release, detains the prisoner by issuing an order of detention under the Preventive Detention Act, giving additional grounds, he cannot be held liable for contempt in the absence of a finding that the order of detention was *mala fide*.<sup>8</sup>

### Mandamus, nature and object of.

'Mandamus' literally means a command. It differs from the writs of prohibition or *certiorari* in its demand for some *activity* on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Court or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.<sup>9</sup>

### Mandamus, Prohibition, Certiorari, and Quo warranto, distinguished from each other.

1. Mandamus differs from *certiorari* and prohibition in that the latter writs are used wherever an inferior tribunal has *wrongly* exercised or *exceeded* its jurisdiction, while Mandamus is only used where the inferior tribunal has *declined* jurisdiction,—the object of Mandamus being not to review or control the action of the inferior tribunal, but merely to compel it to act.

2. While Mandamus demands some *activity*, on the part of the body or person to whom it is addressed, prohibition commands *inactivity*,—the object of prohibition being to prevent the inferior Court from usurping jurisdiction which is not legally vested in it or from exceeding the limits of its jurisdiction.

3. While Mandamus is available against any *public* authority (including judicial and quasi-judicial authorities), including administrative and local bodies, prohibition and *certiorari* lie only against *judicial* and *quasi-judicial* authorities. Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act. If that person refrains from doing the act or refrains from wrong motives from exercising a power which it is his duty to exercise, the Court will by order of mandamus direct him to do what he should do. Mandamus may go to individuals or to corporations and it goes quite independently of whether the individual or body to which it is addressed is not a court, provided only such individual or body has some public duty to perform.

4. When it has been shown that a tribunal has declined to consider matters which it ought to have considered, or has not decided the case according to law, mandamus would be granted commanding the tribunal to proceed according to law. But *certiorari* will lie to quash or remove proceedings on the grounds of want or excess of jurisdiction or of the

5. *Jyotirmoy v. Govt. of West Bengal*, A. 1952 Cal. 562.

6. *Homi v. Baig*, A. 1944 Lah. 196.

7. *Sundaram v. Lalram*, (1958) [Cr. A. 181/56].

8. *Lalabati v. State of M. B.*, A. 1952 M.B. 105.

order being bad on its face, but not on the ground that the tribunal (having jurisdiction) has not taken into consideration matters which it ought to have taken into consideration.

5. Broadly speaking, there is no difference in principle between the writ of *Certiorari* and that of *Prohibition* except that the latter may be issued at an earlier stage—the object of both being to control judicial or quasi-judicial bodies.

But though closely akin to each other, there are points of difference between *Prohibition* and *Certiorari*:

(i) While *certiorari* lies to quash a proceeding after trial, prohibition would not be issued after trial except in a clear case, apparent on the face of the proceedings, that the Court or tribunal was acting without jurisdiction. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the Court to be sent up (to the superior Court), to have its legality inquired into, and, if necessary, to have the order quashed. The object of prohibition is prevention, while *certiorari* may serve the dual purpose of prevention or cure.

In short, *Prohibition* lies if the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision subject to be brought up and quashed on *certiorari*. *Certiorari* lies where the usurpation of jurisdiction is a *fait accompli*, while prohibition lies when usurpation of jurisdiction has not yet taken place, but is merely proposed and there is still something to operate upon.

(ii) On the other hand, *certiorari* may be issued for removing proceedings to the High Court for better justice (in view of the difficult matter involved), even though the inferior tribunal has jurisdiction,—but where the inferior tribunal has jurisdiction, prohibition cannot obviously lie.

6. While *Mandamus* is a peremptory order of the Court commanding somebody to do that which it is under a clear legal duty to do, *Quo Warranto* lies against a person who has claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined.<sup>9</sup>

#### Conditions precedent to the issue of Mandamus.

In order to obtain a writ order in the nature of *Mandamus*, the applicant must satisfy the following conditions:<sup>10</sup>

(i) The applicant must show that he has a *legal right* to the performance of a *legal duty* (as distinguished from a discretion<sup>11</sup>) by the party against whom the *mandamus* is sought.

#### Illustrations.

1. Where the act sought to be compelled lies at the discretion of the Government, e.g., dearness allowance granted compassionately under P. R. 14,<sup>12</sup> or earned leave,<sup>13</sup> no *mandamus* lies to compel Government to grant it or to grant at a particular rate.

2. Similarly, where at a public auction the auctioning authority has, according to the rules, a discretion to accept or reject the highest bid, the highest bidder does not acquire any legal right by reason of his bid being the highest, and cannot, accordingly, maintain an application for *mandamus* to enforce his alleged right.<sup>14</sup>

9. *Nesamony v. Varghese*, A. 1952 T.C. 66.

10. *Cf. Carlsbad Mineral Water Co. v. Jagtiani*, A. 1952 Cal. 315.

11. *State of M. P. v. Mandawar*, A. 1954 S.C. 493.

11a. *Horace v. State of M. P.*, A. 1960 M.P. 252.

12. *Cf. Guruswami v. State of Mysore*, (1955) 1 S.C.R. 305.



3. *Mandamus* does not lie to enforce departmental manuals or instructions not having any statutory force.<sup>13</sup>

(ii) The writ of *mandamus* is only granted to compel performance of duties of a public nature<sup>14</sup> or to enforce private rights when duties of a public nature specially affect private right<sup>15</sup> or when the private rights are withheld by public officers.<sup>16</sup>

The condition is satisfied whenever a statute appoints a person or body of persons to carry out measures of public benefit; the receipt of emoluments by such persons is not essential;<sup>17</sup> nor is it necessary that the body should be incorporated,<sup>18</sup> or be a permanent body.

(iii) The legal right to compel performance of the public duty must reside in the applicant himself, either solely, or in common with others. It will not do to show merely that the applicant has an interest in the performance of the duty. The Petitioner must show that he himself has a legal right to insist on such performance.<sup>19</sup>

On the other hand—

(a) Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for *Mandamus* if the officer acts in contravention of his statutory duty.<sup>20</sup> Thus,

An intending bidder at a public auction is entitled to apply if the authority holding the auction acts contrary to the statute under which the auction is held,<sup>21</sup> or fails to perform his statutory duties in connection with the auction,<sup>22</sup> even though the auction relates to a licence for business in liquor to which no person has an absolute right.<sup>23</sup>

(b) Even though the order of the Government or its officer is likely to be eventually held *ultra vires*, the person against whom it is issued can refuse to comply with it only at his peril. He is, accordingly, entitled to challenge its validity in Court by applying for *mandamus*,<sup>24</sup> though he has not yet been actually injured by the enforcement of the order.

(iv) The application must be made by the aggrieved party. The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the order was made.

(v) The application must be made in good faith and not for an indirect purpose or on behalf of a third party.

(vi) The application must be preceded by a distinct demand for performance of the duty, in order to give the party an opportunity to consider whether he should comply or not, and such demand must be shown to have been met by a refusal either by words or conduct, so that the Court may be satisfied that the party complained of is determined not to do what is demanded.<sup>25</sup> The demand must be made prior to the application.<sup>26</sup>

But a demand is not required 'where it is manifest that it would be an idle ceremony',<sup>27</sup> i.e., where it is obvious that the respondent

13. *Nirankar v. Director of Industries*.

14. *Shankarlal v. Municipal Commrs.*, A. 1939 Bom. 31.

15. *Surajmull v. Commr. of I. T.*, A. 1930 Pat. 538 (539).

16. *Samarendra v. University of Calcutta*, (1951) 55 C.W.N. 443; *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278.

17. *Chettiar Farm v. Kaleeswarar*, A. 1957 Mad. 309 (312).

18. *Guruswami v. State of Bihar*, (1955) 1 S.C.R. 305.

19. *Rambharosa v. Govt. of Bihar*, A. 1953 Pat. 370.

20. *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873.

21. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 303.

22. *Sondhi v. Att. General*, A. 1952 Panj. 351.

23. *Ratan v. Adhar*, A. 1952 Cal. 72.

24. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (152); *Shamdhru v. Pepsu*, A. 1952 Pepsu 152.

would not comply with the demand of the petitioner.<sup>25-1</sup> Thus, where the Government refers to an Industrial Tribunal a dispute which is not an 'industrial dispute', or where the authority making the impugned order referred the petitioner to the Government under whose orders he said he was acting<sup>25</sup> the petition for Mandamus cannot be defeated by raising the objection that no demand for justice had been made.

Further, what the rule requires is that there must be a demand and a denial in *substance*, not in any particular form or words.<sup>26,2</sup> Thus, refusal may be inferred from conduct.<sup>4</sup> All that is necessary in order that Mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what was demanded.<sup>3</sup> Thus, where the Petitioner had previously brought a suit (asking for injunction) for the same relief which was contested by the respondents, a formality of demand and refusal before the petition for Mandamus is not necessary.<sup>4</sup>

### Grounds on which Mandamus may be refused.

Even though the foregoing conditions are satisfied, relief by way of Mandamus, which is discretionary and not 'of right',<sup>26-1</sup> may be refused on any of the following grounds:

(i) Where the act against which Mandamus is sought has been completed and the writ, if issued, will be *infructuous*.<sup>2</sup> On the same principle, the Court would refuse a writ of Mandamus where it would be *meaningless*, owing to lapse of time or otherwise.<sup>2</sup>

(ii) Where the application is *premature*, for instance, where no action contrary to law has yet been done or proposed.<sup>10,11</sup>

(iii) A mandamus will not go when it appears that it would be futile in its results. Accordingly, the Court will not, by mandamus, order something which is *impossible* of performance because the party against whom the order is prayed for does not, for some reason, possess the *power to obey*,<sup>12</sup> or where the office in respect of which the Petitioner seeks relief is held at will and can be terminated immediately on reinstatement;<sup>13</sup> or where the thing ordered cannot be legally given effect to by the party.<sup>14</sup>

### Illustrations.

1. Mandamus will not issue against an order refusing to grant a licence<sup>15</sup> or an order cancelling a licence<sup>16</sup>, after the period for which the licence was granted or applied for (as the case may be) has expired.

25. *Sheoshankar v. State of M. P.*, A. 1951 Nag. 58.
1. *Narendra v. Corpn. of Calcutta*, A. 1960 Cal. 102 (112).
2. *Bengal Club v. Shantiranjan*, A. 1956 Cal. 545.
3. *Rabindra v. State of W. B.*, A. 1954 Cal. 394.
4. *Venugopalan v. Vijayawada Municipality*, A. 1956 Andhra 832 (837).
5. *Raman & Raman v. State of Madras*, A. 1957 Mad. 536 (541).
6. *Kshirode v. Dt. Magistrate*, (1955) 50 C.W.N. 373.
7. *Senairam v. I. T. Commr.*, A. 1955 Assam 201.
8. *Manilal v. Mondad*, (1918) 22 C.W.N. 951.
9. *Guruswami v. State of Mysore*, (1954) S.C.A. 993 (999).
10. *E. I. Commercial Co. v. Collector*, A. 1957 Cal. 606 (613).
11. *Nanda v. Board of Trustees*, A. 1957 Cal. 578 (582).
12. *Amar v. Govt. of Pepsu*, A. 1953 Pepsu 58 (62).
13. *Balkrishnan v. State of Punjab*, A. 1956 Punj. 201.
14. *Kamala v. Calcutta University*, A. 1956 Cal. 563 (567).
15. *A. N. Sinha v. Mukherjee*, A. 1956 Cal. 146.
16. *Kshirode v. Dt. Magistrate*, A. 1956 Cal. 96.



2. Where a recruitment examination at which the Petitioner was declared successful was subsequently cancelled, mandamus will not issue to quash the order of cancellation because even if the Petitioner is declared successful, he has no legal right to be appointed to Government service.<sup>17</sup>

(iv) The writ being discretionary, it may be refused on equitable grounds, such as *suppression or misstatement of material facts* in the application.<sup>18</sup> [See p. 353, ante].

(v) It may be refused on the ground of *laches*, or unexplained delay.<sup>19,21</sup> [See pp. 351-2, ante].

(vi) Mandamus is not an appropriate proceeding to decide questions of title to property<sup>22</sup> or complicated questions of fact.<sup>23,24</sup>

(vii) A Mandamus cannot issue against a public servant to enforce a contract, independently of any statutory duty or obligation to the applicant.<sup>25</sup>

(viii) Mandamus will not issue to compel a person to institute legal proceedings, even in cases of contravention of a statute.<sup>2</sup>

(ix) The object of Mandamus being simply to compel performance of a legal duty on the part of some person or body who is entrusted by law with that duty, the Court, in a proceeding for Mandamus, will never sit as a Court of appeal so as to examine facts or to substitute its own wisdom for the discretion vested by law in the person or body against whom the writ is sought.<sup>4</sup>

(x) It would not issue to correct a mere irregularity which has not affected the jurisdiction or resulted in a failure of justice.<sup>3</sup>

#### How far existence of alternative remedy bars mandamus.

In England, it is settled that mandamus, being a discretionary remedy, will not be issued if the Court is satisfied that there is an alternative remedy which is not 'less convenient, beneficial and effective', than mandamus.

In India, a distinction has been made between the cases where the writ or order in the nature of mandamus is sought for the enforcement of fundamental rights and where it is sought for 'other purposes':

(A) As regards *fundamental rights*,—it has been held that the enforcement of the fundamental rights being the duty of the Courts (under Art. 32<sup>6</sup> or 226<sup>7</sup>) and the powers of the Supreme Court or High Court under Arts. 32 or 226 not being confined to issuing 'prerogative writs' only,—

"the principle that a Court will not issue a prerogative right when an adequate alternative remedy was available could not apply where

17. *Abdul v. State of U. P.*, A. 1960 All. 123.

18. *Ibrahim v. High Commr.*, A. 1951 Nag. 38 (43).

19. *Muthiah v. Commr. of I. T.*, A. 1951 Mad. 204.

20. *Satyanarayan v. State of W. B.*, A. 1957 Cal. 310 (317).

21. *Nanda v. Board of Trustees*, A. 1957 Cal. 578 (581).

22. *Harnath v. State of Hyderabad*, A. 1958 A.P. 222 (226).

23. *Sohan Lal v. Union of India*, A. 1958 S.C. 529.

24. *Lilawati v. State of M. B.*, A. 1962 M.B. 105 (114); *Parraju v.*

*B. N. Ry.*, A. 1952 Cal. 610.

25. *Carlsbad Co. v. Jagtiani*, A. 1952 Cal. 315.

1. *Dubar v. Union of India*, A. 1952 Cal. 496.

2. *Chettiar Farm v. Kaleeswarar Mills*, A. 1957 Mad. 309 (314).

3. *Nagpur Glass Works v. State of M. P.*, A. 1955 Nag. 32 (35).

4. *Vice-Chancellor v. S. K. Ghose*, A. 1954 S.C. 217 (220).

5. *Senairam v. I. T. Commr.*, A. 1955 Assam 183 (209).

6. *Himmattal v. State of M. P.*, (1952-54) 2 C.C. 242 : (1954) S.C.R.

a party came to the Court with an allegation that his fundamental right had been infringed." Thus,—

Though ordinarily an application for a writ is not an appropriate proceeding where a question of title is involved,—where goods are seized by the Police from the possession of a person *without any authority of law* in contravention of Art. 31 (1); *mandamus* should be issued to direct restoration of the goods to the possession of that person without entering into the question of title to the goods seized.<sup>7</sup>

Similarly, the writ will not be refused on the ground of alternative remedy—

Where property registered in the Petitioner's name has been attached for arrears of income-tax due from her husband.<sup>8</sup>

(B) As regards '*other purposes*',—the English rule has been applied.

Thus, *mandamus* will not issue—

(a) To correct an error or irregularity in the judgment of a Court which could be corrected by appeal or revision;<sup>9</sup>

(b) Where effective and convenient remedy is provided by the statute which created the right which has been infringed.

### Illustrations.

1. The petitioner, who complained of the jurisdiction of the Income-tax Investigation Commission and applied for writs of Prohibition and Certiorari, had already availed himself of the remedy provided by s. 8 (5) of the Taxation of Income (Investigation Commission) Act, 1947 and a reference under that section was already pending before the High Court when the petition under Art. 226 was made. *Held*, in the circumstances, it was proper for the High Court to refuse the writs.<sup>10</sup>

2. Where the authorities under the Motor Vehicles Act, 1939 had refused permits upon the wrong assumption that the issue of a permit was dependent upon the ownership of the vehicle, *held*, that it was a case of *erroneous* exercise of discretion and not an act without jurisdiction, and that remedy must be sought from the 'hierarchy of administrative bodies established by the Act' and not by a writ of *mandamus* from the Court.<sup>11</sup>

(c) Where the aggrieved party would get an adequate remedy by an ordinary action<sup>12</sup> in the Civil Court, e.g., where he has been dispossessed by another party in breach of an agreement under which he had entered into possession;<sup>13</sup> to recover a debt which is recoverable by an ordinary suit,<sup>14</sup> to enforce or restrain the performance of a contractual obligation or to remedy a breach of contract.<sup>15, 17</sup>

In an earlier case,<sup>16</sup> where the State sought to interfere with vested contractual rights under a legislation which was not retrospect-

7. *Wazir Chand v. State of H. P.*, (1955) S.C.R. 408.

8. *Dhanalakshmi v. I.T.O.*, A. 1957 Mad. 376.

9. *Wishwanath v. 2nd Addl. Dt. Judge*, A. 1951 Nag. 6.

10. *Rashid v. I. T. Investigation Commn.*, (1954) S.C.R. 738 : (1952-54) C.C. 454.

11. *Veerappa v. Raman*, (1952) S.C.R. 583 : (1952-54) C.C. 444.

12. *Mali Lal v. Uttar Pradesh*, A. 1951 All. 257 (265) F.B.; *Shyamapada v. Abani*, A. 1951 Cal. 430.

13. *B. B. Light Ry. v. State of Bihar*, A. 1951 Pat. 231 (234).

14. *In re Nagabhushana*, (1950) 2 M.L.J. 378 (379).

15. *Carlsbad Co. v. Jagtiani*, (1950) 87 C.L.J. 149; *Dubar v. Union of India*, A. 1952 496.

16. *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919.

17. *Shantabai v. State of Bombay*, A. 1958 S.C. 532.

18. *Chholabhai v. State of M. P.*, A. 1953 S.C. 108.



tive, the Supreme Court granted relief by an order in the nature of mandamus. But this decision has been explained away in two later cases<sup>19, 20</sup> where it has been held that no relief under Art. 32 can be granted where a purely contractual right (unattended by any proprietary interests, e.g., where a contract to transfer interest in immovable property which is unregistered<sup>21</sup> is threatened by State action. The remedy, if any, is by a suit for specific performance or breach of contract.

But the existence of an alternative remedy is no bar in the following cases :

(a) Where the applicant has no right to pursue the alternative remedy, i.e., where the statute simply gives power to the Government or any other authority to revise the order complained of, *suo motu* and the applicant has no right to apply for such revision.<sup>22</sup>

(b) Where, owing to the delay involved in a suit, the remedy would be ineffective or inadequate.<sup>23</sup>

#### Illustrations.

(i) The cinema licence of the Petitioner was illegally cancelled. A mandamus was issued directing the Commissioner to make a proper order under the law, holding that a right of suit or the remedy of injunction was inadequate to meet the exigencies of the case, because—  
(a) A notice under s. 80, C. P. Code would be required to institute the suit, which would at once import delay. (b) The delay of a prolonged civil litigation, including appeal would ruin the big commercial undertaking involved in the case.<sup>24</sup>

(ii) The working of a mine requires continuity and when that is interfered with by an act of the Government, contrary to the statutory right of the Petitioner, mandamus cannot be refused on the ground that a suit would lie.<sup>25</sup>

(c) Where the alternative remedy is of an *onerous* character, so that it can hardly be described as an adequate alternative remedy, e.g., where the Petitioner is required to deposit the amount of the assessed tax before he can exercise his right of appeal against the order of assessment.<sup>26</sup>

#### Whether refund of unconstitutional tax can be directed by mandamus.

It is now settled that a tax-payer is entitled to recover the payment of a tax which is subsequently held to be *ultra vires* or unconstitutional.<sup>27</sup>

The question whether such relief may be available in a proceeding for mandamus is, however, not yet finally settled. There are High Court decisions<sup>28</sup> which hold that such relief can be had only in a suit for declaration that the tax is illegal and for consequential relief.

In the case before the Supreme Court, however, the Allahabad High Court had granted mandamus directing the Government to refund the monies paid under a tax which had been declared to be unconstitutional in a previous proceeding.<sup>29</sup> On appeal to the Supreme Court,<sup>30</sup>

19. *Brij Kishore v. Rent Control Officer*, A. 1954 All. 428.

20. *Commr. of Police v. Gordhandas*, (1952) S.C.R. 135 (150).

21. *C. P. More v. State of M. P.*, A. 1956 Nag. 34 (36).

22. *Himmallal v. State of M. P.*, (1954) S.C.R. 1122.

23. *S. T. O. v. Kanhaiya Lal*, A. 1959 S. C. 135 (144).

24. *Parekh v. S. K. M. Committee*, A. 1959 Mys. 29 (31); *Belaraju v. Hyderabad Municipality*, A. 1960 A. P. 234 (246).

25. *S. T. O. v. Budh Prakash*, (1955) 1 S.C.R. 243.

the Court refused to hear the plea that such relief was not available on a petition under Art. 226, on the ground that such plea was not raised in the High Court.

The question was not, accordingly, decided on the merits by the Supreme Court. The following conclusions, however, emerge from the decision.

(i) Refund of an illegal tax is a relief which may, in particular cases, be directed by an order in the nature of *mandamus*.

(ii) Whether the Court will grant such relief on a petition under Art. 226 or relegate the petitioner to a declaratory suit, is a matter for the Court's discretion, to be exercised according to the principles discussed earlier.

But where the declaration as to the invalidity of the tax has already been obtained under a competent judicial proceeding, there cannot be any objection that for obtaining the refund, the tax-payer must bring a declaratory suit instead of a petition for *mandamus*.

#### How far existence of the remedy of appeal bars *mandamus*.

1. Appeal is an 'alternative remedy' which bars the remedy of *mandamus*, provided it is not less convenient, beneficial and effective.<sup>1</sup> Hence, if the person aggrieved has a right of appeal against the order complained of but he has made no attempt to avail himself of that remedy, he cannot be given relief under Art. 226 unless he can show that such alternative or that the conduct of the authorities is such that they are not likely to discharge their duties without the guidance of the Court.<sup>2</sup>

2. But the existence of the remedy of appeal cannot be said to be equally beneficial or convenient or effective in cases like the following, and in such cases *mandamus* would issue notwithstanding the right of appeal:

(i) Where it is *not possible* for the applicant to file an appeal, e.g., where the authority has simply refused his application without stating the reasons for such refusal,<sup>3,4</sup> or where the authority has made no 'order' under the statute against which an appeal could be preferred,<sup>5</sup> or where from the order as it stood it was not clear whether an appeal lay or not;<sup>6</sup> or where the matter has been simply kept pending by the authority, without passing any order at all.<sup>4</sup>

(ii) Where the Petitioner would have no legs to fight the appeal, e.g., where the authority has not allowed any opportunity to the Petitioner to place any materials in support of his objection;<sup>7</sup> or where evidently no adequate relief can be obtained by appeal, e.g., where there was no bye-law authorising the issue of licence.<sup>8</sup>

(iii) Where the appellate authority has admitted an appeal, but fixed no date for hearing and it cannot be ascertained when the appeal is likely to be heard, while the Petitioner has been granted only 7 days' stay of execution of the order appealed against.<sup>9</sup>

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1. *Raman Lal v. Municipal Board*, (1952) 7 D.L.R. 126 (All.).
  2. *Motilal v. Govt. of Uttar Pradesh*, A. 1951 All. 257.
  3. *Mukund v. Municipal Committee*, A. 1953 Punj. 88.
  4. *Mangru v. Commr. of Budge Budge Municipality*, (1951) 87 C.L.J. 369 (374).
  5. *Union of India v. Kundan Lal*, A. 1957 All. 363.
  6. *Agarwal v. R. T. A.*, A. 1953 Raj. 1.
  7. *Gayadinram v. A. D. Khan*, (1951) 55 C.W.N. 667.
  8. *Rashid Ahmed v. Municipal Board*, (1959) S.C.R. 566.
  9. *Wanchoo v. Collector*, A. 1952 Punj. 268 (269).



(iv) Where a fundamental right has been infringed.<sup>10</sup>

(v) Where the Act which provides the alternative remedy is itself *ultra vires*.<sup>11</sup>

#### Against whom mandamus will not issue.

Mandamus will not be granted against the following persons :

(i) The President, or the Governor of a State, for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties (Art. 361, *post*).

(ii) An inferior or ministerial officer who is bound to obey the orders of his higher authority, to compel him to do something which is part of his duties in that capacity.<sup>12</sup>

(iii) Mandamus will not issue against persons who are not holders of 'public' offices.<sup>13</sup> It cannot issue against a private organization however powerful it may be,<sup>14</sup> or a private Trading Corporation, unless it is entrusted with any public duty,<sup>15</sup> in the discharge of which it has failed.<sup>16</sup>

(iv) Mandamus does not lie against a private individual or body whether incorporated or not, except where the State is in collusion with such private party,<sup>17</sup> or the private individual is vested with a public duty.<sup>18</sup>

#### Illustration.

A writ of mandamus may issue against the Union of India if a displaced person has been evicted from his property in contravention of the Public Premises (Eviction) Act, by the Union of India and the property is in the possession of the latter. But no remedy by way of a writ under Art. 226 is available if the property is in the possession of another displaced person who entered into possession without knowledge that the eviction was illegal and without any collusion with the Union of India.<sup>19</sup>

(v) Mandamus will not issue against the *Legislature*, even where it is going to enact a law which offends against fundamental rights.<sup>20</sup>

#### Uses of Mandamus.

So far, mandamus has been issued under our Constitution for the following purposes :

##### (A) For the enforcement of Fundamental Rights.

In India, the writ is available under Arts. 32 and 226 not only for the purposes for which it is available in England, but also for the enforcement of Fundamental Rights. It is obvious that the remedy by means of the writ being guaranteed by the Constitution for the enforcement of the Fundamental Rights, it becomes the duty of the Court

10. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566; *Mangru v. Commrs. of Budge Budge Municipality*, (1951) 87 C.L.J. 369 (374); on appeal, (1952) 57 C.W.N. 25 (49).

11. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

12. *In re Babul Chandra*, A. 1952 Pat. 309 (311).

13. *Laxman v. Rajpramukh*, A. 1953 M.B. 54.

14. *In re Nagabhusana*, A. 1950 Mad. 1119.

15. *Ganapathi v. Tiffins*, A. 1953 Mad. 556.

16. *Chettiar Farm v. Kaleeswara Mills*, A. 1957 Mad. 309 (316).

17. *Sohan Lal v. Union of India*, A. 1957 S.C. (532).

18. *Nagpur Corpn. v. N. E. L. & P. Co.*, A. 1958 Bom. 498 (507).

19. *Chotey Lal v. State of U.P.*, A. 1951 All. 228.

to issue the writ of mandamus where a fundamental right has been infringed or is threatened<sup>20</sup> to be injured.

### Illustrations.

(i) Holding that the Bihar Sathi Lands (Restoration) Act, 1950 offended against Art. 14 of the Constitution, a writ of mandamus was issued against the State Government not to take any steps in pursuance of the Act so as to interfere with the possession of the Petitioners.<sup>21</sup>

(ii) Where the Petitioner, who was otherwise eligible for appointment to the Subordinate Civil Judicial Service, was not selected owing to the operation of a 'Communal Rotation Order' which infringed the fundamental right guaranteed to the Petitioner by Art. 16 (1)-(2), the Court issued an order directing the State of Madras "to consider and dispose of the Petitioner's application for the post after taking it on the file on its merits and without applying the rule of communal rotation."<sup>22</sup>

(iii) Holding that certain sections of the Orissa Hindu Religious Endowments Act, 1939, amounted to unreasonable restrictions on the right of property guaranteed by Art. 19 (1) (f), a writ of mandamus was issued restraining the Commissioner and the State Government from enforcing those provisions against the Petitioners.<sup>23</sup>

(iv) Where a Municipal Board issued an order prohibiting the Petitioner to carry on the trade of wholesale dealer in vegetables and prosecuted the Petitioner for violation of a bye-law and both the order and the bye-law contravened the fundamental right guaranteed by Art. 19 (1) (f), the Court issued an order directing the respondent Board not to prohibit the Petitioner from carrying on the trade and also to withdraw the prosecution pending against the Petitioner.<sup>24</sup>

(v) Holding that certain provisions of the Bombay Police Trusts Act, 1950, offended against Arts. 25-26 of the Constitution, a writ was issued restraining the State Government and the Charity Commissioner from enforcing those provisions against the appellant.<sup>25</sup>

(vi) To prohibit a State from enforcing an order of the Education Department of the State which contravened Art. 29 (2) of the Constitution.<sup>1</sup>

(vii) Where ancient grants in favour of the Petitioners were revoked by executive order, without the authority of law, in contravention of Art. 31 (1), a writ was issued "restraining the State from giving effect to the orders complained of and directing it to restore possession to the Petitioners if possession had been taken."<sup>2</sup>

(B) To enforce the mandatory provisions of the Constitution.

Mandamus will issue not only where a fundamental right has been infringed but also where the action of the public official or Government,

20. *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

21. *Ram Prasad v. State of Bihar*, A. 1953 S.C. 215.

22. *Venkataramana v. State of Madras*, A. 1951 S.C. 229.

23. *Jagannath v. State of Orissa*, (1954) S.C.A. 569 (576); see also *Raghubir v. Court of Wards*, A. 1953 S.C. 373.

24. *Rashid Ahmed v. Municipal Board*, (1950-51) C.C. 61 (63). [See also *Chintamanrao v. State of M. P.*, (1950-51) C.C. 64; *Dwarka Prasad v. State of U. P.*, (1954) S.C.A. 204 (215); *State of Rajasthan v. Nathmal*, A. 1954 S.C. 307.

25. *Ratilal v. State of Bombay*, A. 1954 S.C. 388.

1. *State of Bombay v. Bombay Education Society*, A. 1954 S.C. 561. [See also *State of Madras v. Champakam*, (1950-51) C.C. 183].

2. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415; see also *Hamdard Dairakhana v. Union of India*, A. 1960 S.C. 554 (569).



violates a mandatory provision of the Constitution, so as to make it *ultra vires*, e.g., Art. 321.<sup>3</sup>

(C) *To compel public officials, individuals or bodies to perform their public duties.*

Even when a private person or body of persons is vested with a public duty, say by statute, such person or persons are treated as public bodies for the purposes of *mandamus*.<sup>4</sup>

For this purpose, the following, *inter alia*, have been held to be public offices or bodies :

(i) The Syndicate of a University.<sup>5</sup>

(ii) The State Medical Faculty.<sup>6</sup>

(iii) A Municipal Committee.<sup>7,8</sup>

(iv) Universities and similar statutory educational bodies.

[See under 'Educational authorities', *post*].

(v) An electricity company having statutory duties in the matter of supply of its energy to the public.<sup>9</sup>

(vi) Government Officers and Departments.

(D) *To direct public officials not to enforce a law which is unconstitutional.*<sup>10</sup>

#### Illustrations.

(i) Where a Sales Tax was *ultra vires*, being in contravention of Art. 286 (1) (a) of the Constitution, so that the imposition of a tax under that statute was without the authority of law and there was, consequently, a violation of the fundamental right of the appellant under Art. 19 (1) (g), *mandamus* was issued restraining the sales tax authority from imposing or authorising imposition of such tax on the appellant.<sup>11</sup> The same principle was applied where a license fee was imposed on a business under a bye-law which was *ultra vires*.<sup>12</sup>

(ii) Holding that certain provisions of the Bombay Public Trusts Act, 1950, offended against Arts. 25-26 of the Constitution, a writ was issued restraining the State Government and the Charity Commissioner from enforcing those provisions against the appellant.<sup>13</sup>

(iii) Holding that so long as the principles referred to in cl. 4 of the Non-Ferrous Metal Control Order, 1954 were not notified and laid before Parliament as required by the Essential Commodities Act, 1955, cl. (4) constituted unreasonable restrictions upon the rights guaranteed by Art. 19 (1) (f) and (g), the Court issued an order "restraining the respondents from enforcing cl. 4 of the Non-Ferrous Metal Control Order, so long as principles in accordance with law are not

3. *Mira Chatterjee v. Public Service Commission*, A. 1958 Cal. 345 (349).

4. Vide C3, Vol. II, p. 103.

5. *S. K. Ghose v. Vice-Chancellor*, A. 1952 Orissa 1; *University of Calcutta v. Dipa Pal*, (1952) 56 C.W.N. 730; *Tapendra v. University of Calcutta*, A. 1954 Cal. 141.

6. *Bejoyranjan v. C. C. Das Gupta*, (1952) 7 D.L.R. 168 (Cal.).

7. *Rashid Ahmed v. Municipal Board*, (1950-51) C.C. 61.

8. *Yasin v. Town Area Committee*, (1952-4) 2 C.C. 212.

9. *Nagpur Corpn. v. N. E. L. & P. Co.*, A. 1958 Bom. 498.

10. *Ramprasad v. State of Bihar*, A. 1953 S.C. 215.

11. *Himmattal v. State of M. P.*, (1952-4) 2 C.C. 242; *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661.

12. *Yasin v. Town Area Committee*, (1952) S.C.R. 572 (581). [Also *Tahir Husain v. Dt. Board*, A. 1954 S.C. 630].

13. *Ratilal v. State of Bombay*, A. 1954 S.C. 368.

published in the Official Gazette and laid before the Houses of Parliament in accordance with . . . the Essential Commodities Act."<sup>14</sup>

(R) *To direct public officials not to enforce a subordinate legislation which is ultra vires.*<sup>15</sup>

Thus, mandamus has been issued to quash a notification fixing minimum wages which was *ultra vires*.<sup>16</sup>

(F) *To direct public officials to comply with the requirements of the law, in exercising statutory powers.*

Thus, while granting the renewal of a permit, the Authority imposed *ultra vires* conditions, the Court directed the Authority "to comply with the requirements of the law . . . in the order of renewal made by them."<sup>17</sup>

(G) *Against the Government of India or of a State.*

In India, there is no immunity of the Government corresponding to the immunity of the Crown in England. Only the Executive heads of the Union and the States have *personal* immunity for their official acts, under Art. 361 but that Article expressly provides that appropriate proceedings may be brought against the Government concerned.

(i) It is obvious that Mandamus will issue against the Government where fundamental rights of the Petitioner have been infringed by State action.

#### *Illustration.*

Holding that the Bihar Sathi Lands (Restoration) Act, 1950 offended against Art. 14 of the Constitution, a writ of mandamus was issued against the State Government not to take any steps in pursuance of the Act so as to interfere with the possession of the Petitioners.<sup>18</sup>

(ii) In matters relating to Government servants where there is a violation of the constitutional provisions or any provision of law (see, further, under Art. 311, post).

(iii) Where the Government exceeds its statutory powers or violates its statutory obligations.<sup>19</sup>

(H) *To compel inferior Courts and tribunals to exercise their jurisdiction, when they have refused to exercise it.*<sup>20</sup>

When a tribunal acts upon extraneous considerations or decides a point other than that brought before them, the tribunal is deemed to have declined jurisdiction and mandamus lies.<sup>21</sup>

But—

Mandamus cannot be used by way of appeal to correct erroneous decisions within jurisdiction, whether of law or of fact. It can be used only in case of non-performance of their duty, to compel performance.<sup>22</sup>

(I) *To compel domestic tribunals to comply with requirements of natural justice.*

Mandamus was issued against the Governing Body of the State Medical Faculty where they imposed penalty against candidates on the ground that they had adopted unfair means at the examination, without giving notice to the candidates of the charges against them

14. *Narendra v. Union of India*, A. 1960 S.C. 430.

15. *Vasudevan v. State of Kerala*, A. 1960 Ker. 67; *Puncturi Boat Service v. State of T. C.*, A. 1955 T.C. 97.

16. *Sheriff v. Mysore S. T. A.*, A. 1960 S.C. 321 (327).

17. *Ram Prasad v. State of Bihar*, A. 1953 S.C. 215.

18. *State of Bombay v. Laxmidas*, A. 1952 Bom. 468.

19. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 188.

20. *Jagannath v. D. M.*, A. 1951 All. 710.



and without giving them any opportunity of showing that the allegations were not true.<sup>21</sup>

(J) *To restore, admit or elect to an office.*

A writ of *mandamus* lies to (i) command an election to an office of a public nature (e.g., a municipal election); (ii) admit to a public office a person who has been elected thereto, but has never been in possession; (iii) compel the restoration to a public office or franchise of which the holder has been wrongly dispossessed.<sup>22</sup>

But—

A *mandamus* to restore, admit or elect to an office will not be granted unless the office is vacant. If the office be in fact full, proceedings must be taken by way of *Quo Warranto* or election petition to oust the party in possession. A *mandamus* will go only on the supposition that there is nobody holding the office in question.<sup>23, 24</sup>

*Mandamus* will, however, be issued commanding election to an office when, though there has been an election to the office in question, yet such election is void or merely colourable.<sup>25, 26</sup>

#### Duty and discretionary power.

1. In compelling a public officer to perform his statutory duty, the Court must distinguish between a 'duty' and a 'discretion'.

(i) *Mandamus* will not be issued to compel an authority to exercise a *discretion* in a particular way. In other words, the Court cannot substitute its own view or discretion for the view taken or discretion exercised by the authority who is vested with a discretionary power.<sup>27</sup> The writ of *mandamus* can never be used as a substitute for appeal.<sup>28</sup>

If the authority has exercised the discretion entrusted to it *bona fide* and not influenced by extraneous considerations, the Court cannot interfere.<sup>1</sup>

(ii) But if the authority is under a *duty* to exercise a discretion, it can be compelled by *mandamus* to exercise it *in one way or other*. A duty to exercise a power or discretion is readily inferred where the power is conferred for the *public benefits* or for the purpose of enforcing a legal right.<sup>2</sup> In such cases, the public authority must exercise the power when the circumstances so demand; and the performance of it can be compelled by *mandamus*, if the authority has either failed to exercise the discretion or has exercised it upon extraneous considerations in which case the law imputes a failure to exercise the discretion.<sup>3</sup>

#### Illustrations.

1. Under r. 250 of the Rules framed under the City of Bombay Police Act, 1902 the Commissioner is bound to exercise his own independent judgment and to decide for himself with reference to the facts and circumstances of the case, whether to cancel the licence or not. Where the Commissioner cancelled a licence 'as directed by the

21. *B. C. Das Gupta v. Bijoyrajan*, (1952) 56 C.W.N. 861.

22. *Rajkrishnan v. Chief Commr.*, A. 1952 Panj. 176.

23. *Mohichandra v. Secy., Local Self-Govt.*, A. 1953 Assam 12.

24. *Sohan Lal v. Union of India*, A. 1957 S.C. 529.

25. *Veerappa v. Raman & Raman Ltd.*, (1952) S.C.R. 583.

1. *Rameswar v. R. T. A.*, A. 1958 All. 575 (578); *Jyoti Sarup v. Board of Revenue*, A. 1953 All. 25.

2. *Commissioner of Police v. Gordhandas*, (1952) S.C.R. 135 (148).

3. *Rameswar v. R. T. A.*, A. 1958 All. 575 (578).

Commissioner', the Supreme Court issued a mandamus directing the Commissioner to make a proper order.<sup>2</sup>

2. It is mandatory under s. 57 (3) of the Motor Vehicles Act, 1939, that an application which is presented under s. 57 (1) should be published. Since no time limit is prescribed by the section for such publication, it must be published within a *reasonable time*. Where no action is taken on an application within 6 months while applications of subsequent dates have been dealt with, mandamus would issue directing the R.T.A. to take action under s. 57 (3).<sup>3</sup>

3. On receipt of a report under s. 12 (5) of the Industrial Disputes Act, 1947, that conciliation has failed, the Government is required either to refer the dispute to a Tribunal or communicate to the parties concerned its reasons for not doing so. If it does neither, mandamus would issue to compel the Government perform its duty.<sup>4</sup>

On the other hand, if the Government states the reasons, it is not for the Court to go into the merits of those reasons,<sup>5</sup> except where the Government refuses to refer the dispute on extraneous considerations.<sup>6</sup>

II. In the eye of law, an authority shall be deemed to have failed to exercise its discretion—

(a) Where it has violated any of the requirements of *natural justice*.<sup>7</sup>

(b) Where it has exercised its discretion *mala fide* or for a purpose other than that for which it was entrusted with the discretion, it is a *mala fide* exercise of the discretion if the authority is influenced by *extraneous*<sup>8</sup> or irrelevant consideration, i.e., matters which are foreign to the statute under which the power is being exercised,<sup>9</sup> or has omitted to consider such aspects of the question as would constitute a failure to exercise the discretion at all.<sup>11</sup>

III. In the absence of any such circumstances as above, *mandamus* cannot be used for correcting a mere *erroneous* exercise of discretion. Mandamus cannot be used as a substitute for appeal.<sup>12</sup>

Thus, where it is alleged that Government has made a *mala fide* use of its statutory power to make an appointment, the court cannot test the appointment from the standpoint of suitability; it can interfere only if the appointment was made for an *ulterior* purpose, that is, for an object other than that for which the law, under which the appointment was made, had been enacted.<sup>13</sup>

IV. Where there is no duty to exercise a discretionary power, *mandamus* is not available to compel the authority to exercise the power.

#### Illustration.

The making of a reference under s. 10 (1) of the Industrial Disputes Act, 1947, is entirely discretionary with the Government.<sup>14</sup> Hence,

4. *Shiv Narain v. R. T. A.*, A. 1953 Raj. 1.

5. *State of Madras v. Swadesamitran P. L. Union*, A. 1952 Mad. 297.

6. *Madan v. State of W. B.*, (1958) 62 C.W.N. 345 (348).

7. *Ramchandra v. State of Bombay*, A. 1952 Bom. 293.

8. *Bhatia v. Victoria*, A. 1957 All. 359 (361).

9. *Rameswar v. R. T. A.*, A. 1958 All. 575 (578).

10. *Gayadinar v. Khan*, (1951) 55 C.W.N. 667 (673).

11. *K. D. Co. v. K. N. Singh*, A. 1956 S.C. 446 (452).

12. *Sarup v. Board of Revenue*, (1952) A.L.J. 557 (563); *Budhu Ram v. Peralal*, A. 1952 All. 916.

13. *Khetan v. Union of India*, A. 1957 S.C. 676 (686).

14. *S. W. Union v. State of Bihar*, A. 1952 Pat. 210.



*mandamus* will not lie to compel Government to make a reference where Government considers it to be inexpedient.<sup>15</sup> But where Government does not give its reasons for refusing to make a reference, as required by s. 12 (5), it may be compelled to give its reasons.<sup>16</sup> [The Bombay High Court goes further<sup>17</sup> to hold that where the reasons given by Government are irrelevant, the Court may direct it to give proper reasons].

### Who may apply for Mandamus.

1. It is only a person whose rights have been infringed who may apply for *mandamus*. Thus, in the case of an incorporated company, the application must be brought by the company itself; an individual share-holder may apply only if the infringement of the rights of the company constitutes an infraction of the share-holder's individual rights as well.<sup>18</sup>

2. In the case of a company, the person signing and verifying the application must show that he is authorised to do so.<sup>19</sup>

3. Conversely, an association cannot complain where only the personal rights of individual members are affected.<sup>20</sup>

4. Where an individual seeks to enforce a right belonging to an institution, the petition must disclose the facts to show how he was entitled to act on behalf of the institution.<sup>21</sup>

5. The rule of infringement of a right belonging to the petitioner does not, however, mean that the right must belong to the petitioner alone and not to anybody else. He may have the right in common with others. Thus, a rate-payer of a local body may apply for *mandamus* to prevent a misapplication or misappropriation of the public money entrusted with that body,<sup>22,23</sup> or to quash an election held contrary to the provisions of law.<sup>24</sup>

6. The right or interest which is alleged to have been infringed may be proprietary or pecuniary.<sup>1</sup>

7. In the case of violation of a statutory duty or abuse of a statutory power, anybody who is affected by the illegal order is entitled to apply for *mandamus* to quash such order,<sup>2</sup> even though he may not have a substantive enforceable right, e.g., in the case of a liquor licence. But a trespasser *ab initio* would not be allowed to complain about illegal eviction.<sup>2a</sup>

8. An unincorporated society is a judicial person<sup>2b,2c</sup> under s. 3 (42)

15. *Bagaram v. State of Bihar*, A. 1950 Pat. 367 (F.B.).

16. *State of Madras v. Swadesamitran*, A. 1952 Mad. 297.

17. *F. T. & R. Co. v. Krishnan*, A. 1956 Bom. 273.

18. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 809.

19. *Palriwala v. Collector of Customs*, A. 1958 Cal. 232 (233).

20. *Indian Sugar Mills Association v. Government of Uttar Pradesh*, A. 1951 All. 1 (F.B.).

21. *Raj Rani v. U. P. Govt.*, A. 1954 All. 492.

22. *Vemugopalan v. Vijawada Municipality*, A. 1956 Andhra 833 (837).

23. *Narendra v. Corpn. of Calcutta*, A. 1960 Cal. 102 (111).

24. *Municipal Corpn. v. Govind*, A. 1949 Bom. 229.

25. *Venkateswara v. State of A. P.*, A. 1958 A.P. 458 (461).

1. *Chhaganlal v. Asst. Custodian*, A. 1956 San. 47 (50).

2. *Guruswami v. State of Mysore*, A. 1954 S.C. 592; *Sudha Devi v. State of Bihar*, A. 1956 Pat. 506 (510).

2a. *Gurcharan v. Delhi Improvement Trust*, A. 1955 Punj. 34.

2b. *B. C. Das Gupta v. Bhojranjan*, (1952) 56 C.W.N. 851.

2c. *Cf. Sabltri Motor Service v. Asansol Bus Assocn.*, A. 1951 Cal. 255 (S.B.).

of the General Clauses Act and, may accordingly, sue as a body through an office-bearer,<sup>3</sup> e.g., where the association has a statutory right which has been infringed<sup>4</sup> by the order complained of.

9. The legality or illegality of the order is not material. If the order is such that it compels obedience and that the Petitioner can ignore it only at his peril, he is entitled to apply under Art. 226.

**Whether joint petition lies.**—See p. 366, *ante*.

**Parties to a proceeding for Mandamus.**

1. Under Art. 226, Mandamus lies against any 'person' which term, according to the General Clauses Act, includes any company or association or body of individuals whether incorporated or not.<sup>5</sup> Hence, *mandamus* lies against an unincorporated body like the State Medical Faculty. It is not necessary that an unincorporated body should be proceeded against in the individual names of its members.<sup>6</sup>

2. All parties who are required to obey the directions of the writ or whose presence is necessary, to make such directions effective must be before the Court.<sup>7</sup> (See also pp. 364-5, *ante*). Where the writ relates to a right, title or interest in real property, all persons owning or claiming the same should be joined as parties.<sup>8</sup>

**Form of order.**

1. The usual form of a writ of Mandamus is a command directing the respondent to act according to law or to refrain from acting contrary to law. Thus,

Where an administrative authority has the duty to exercise a discretion or power, but has failed to exercise it, the Court cannot by issuing a mandamus, either direct the authority in exercise of the discretion in any particular direction or to cancel his illegal order; the proper direction should be that the authority shall make a proper order after exercising his discretion according to the circumstances of the case.<sup>9</sup>

2. But since our Courts, under Arts. 32 and 226, are not fettered by the technicalities of the English writ, the Courts have sometimes gone beyond a mere order of cancellation of an alleged act or order to give effective relief to the Petitioner. Thus,

(i) The 'istimrari' estate of the Petitioner was taken possession of by the Court of Wards for the purpose of carrying on superintendence over the estate under the Ajmer Tenancy and Land Records Act, 1950. Holding that the Act offended against the fundamental right guaranteed by Art. 19 (1) (f), the Court issued a writ directing the Court of Wards "to forbear from carrying on superintendence of the Petitioner's istimrari estate and the other properties taken possession of, and to restore their possession to the Petitioner".<sup>10</sup>

(ii) The Government of U.P., by an executive order revoked the pre-Constitution grants made to private persons by the Rulers of Indian States. The Supreme Court held this order to be void on the ground of contravention of Art. 31 (f) and issued an order—

"restraining the State of U.P., from giving effect to the orders

3. The contrary decision in *Radha Shyam v. Patna Municipality*, A. 1956 Pat. 182 overlooks the definition in the General Clauses Act.

4. *Barrackpore Bus Service v. Serajuddin*, A. 1957 Cal. 444.

5. *B. C. Das Gupta v. Bejoyranjan*, (1952) 56 C.W.N. 861.

6. *Makhan v. Chatterjee*, A. 1954 Cal. 208 (210).

7. Cf. *Commr. of Police v. Gordhandas*, (1932) S.C.R. 135 (152); see also *State of Madras v. Swadesamitran*, A. 1952 Mad. 297.

8. *Raghunath v. Court of Wards*, A. 1953 S.C. 373 (375).



complained of and directing it to restore possession to the Petitioners if possession has been taken".

(iii) The Vindhya Pradesh Tendu Leaves Act, 1953 provides that no person shall purchase or transport *tendu* leaves unless he obtains a licence. It also authorised the Government to grant contracts for collecting *tendu* leaves from Government waste lands 'but not including land held by Jagirdars and tenants'. Notwithstanding this prohibition with respect to Jagir lands and tenants' holdings, the Government granted contracts to collect leaves from the trees on those lands and then granted a licence to the Petitioner for purchase of leaves 'from contractors in Vindhya Pradesh.' Since under the Act, contracts would not be granted in respect of lands held by Jagirdars and tenants, the imposition of the condition in the licence requiring the Petitioner to purchase only from contractors was *ultra vires* and hence constituted an unreasonable restriction within the meaning of Art. 16. The Supreme Court (under Art. 32), therefore, directed—

"that the words 'from contractors in Vindhya Pradesh' shall be omitted from the licence granted to the Petitioner."<sup>9</sup>

#### Costs in a proceeding for Mandamus.

1. Costs are usually awarded to a successful Petitioner,<sup>11</sup> except when the success is divided.<sup>12</sup> Costs may be awarded even against an inferior Court when it has refused to exercise its jurisdiction or try a case on improper grounds.

2. The Court may award costs to a Petitioner even though he fails to obtain a writ of mandamus, e.g., where he establishes that his legal right has been infringed, but the Court is unable to grant him relief because the writ would be ineffective, owing to delay for which the Petitioner is not responsible.<sup>13</sup>

3. On the other hand, the Court may refuse costs to a successful Petitioner where the success of the Petitioner is due to the invalidity of a law as distinguished from any unjustifiable conduct on the part of the Respondent.<sup>14</sup>

4. Where the Petitioner fails, costs are as a rule allowed to the Respondent.<sup>15,16</sup>

But costs may be refused to the Respondent—where there has been an irregularity in the proceedings challenged but it does not amount to such a violation of the law as would entitle the Petitioner to writ of Mandamus;<sup>17</sup> where the Petitioner has some real grievance, but he fails to establish that the impugned law is unconstitutional;<sup>18</sup> where,

9. *Virendra v. State of U.P.*, (1955) 1 S.C.R. 415.

10. *Hamid v. State of M. P.*, A. 1950 S.C. 950.

11. Cf. *Ram Prasad v. State of Bihar*, A. 1953 S.C. 215 (220); *Raghunath v. Court of Wards*, A. 1953 S.C. 373 (375).

12. *State of Bombay v. United Motors*, A. 1953 S.C. 252 (263); *State of T. C. v. Cashewnut Factory*, A. 1953 S.C. 333 (339).

13. *Guruswamy v. State of Mysore*, (1955) 1 S.C.R. 305.

14. Cf. *Dwarka Prasad v. State of U. P.*, (1954) S.C.R. 803.

15. *Cooverjee v. Excise Commr.*, (1954) S.C.A. 256; *Soma Singh v. State of Pepsu*, (1954) S.C.A. 351; *Nain Sukh v. State of U.P.*, A. 1953 S.C. 384.

16. *R. v. Torquay J.J.*, (1951) 2 All E.R. 656; *R. v. Dunsheath*, (1950) 2 All E.R. 741; *R. v. Minister of Health*, (1950) 1 All E.R. 875.

17. *Vice-Chancellor v. S. K. Ghose*, (1954) S.C.R. 883.

18. *Babul Chandra v. Palna High Court*, A. 1954 S.C. 524; *Sharma v. Salish*, (1954) S.C.R. 1077.

though the Petitioner has failed, there were important constitutional questions which needed clearing up in the proceeding.<sup>19</sup>

5. The conduct of the Petitioner is an important factor to be taken into consideration in awarding costs. Thus,

In *Satischandra v. Union of India*,<sup>20</sup> where the Petitioner first argued his case personally but when the judgment was ready, he asked for a rehearing through a counsel which was granted and at the rehearing, too, he failed to succeed, the Court observed—

"When the matter was first argued we had decided not to make any order about costs but now that the petitioner has persisted in reopening the case and calling the learned Attorney-General here for a second time, we have no alternative but to dismiss the petition with costs."<sup>21</sup>

### Effect of refusal to comply with a writ or order in the nature of Mandamus.

An intentional refusal to do the act at the time when it is required to be done by a writ of mandamus constitutes contempt of court.<sup>22</sup>

### Particular cases where mandamus has been used.

#### Collector.

Mandamus has been issued against the Collector and similar administrative officers—

(a) Where his act or order is *ultra vires*, e.g.—

To quash the order of removal of a *sarpanch* which is not in terms of the relevant law.<sup>23</sup>

#### B. Educational authorities.

1. Where Universities and similar bodies are created by statute, their powers are limited by such statute and the rules and regulations validly made thereunder. Hence, the Court can issue mandamus against them in cases where it could be issued against other statutory bodies e.g., where the order or resolution of the University is *ultra vires*.<sup>24</sup>

#### Illustrations.

Mandamus was issued against the University authorities—

(a) directing them not to give effect to an order cancelling the examination of a candidate and to reconsider her case according to law, when her examination had been cancelled on suspicion of unfair practice, but without complying with the rules and regulations of the University for proceeding against a candidate in such matters,<sup>25</sup> or

(b) directing them to announce the Petitioner as passed when such announcement had been withheld upon a wrong interpretation of its Regulations.<sup>26,1</sup>

2. But in matters relating to the internal working of a University, (say, the matter of admission)<sup>2,2</sup> the Court will not interfere unless the

19. *Gajapati v. State of Orissa*, A. 1953 S.C. 375 (384); (1954) S.C.R. 1.

20. *Satischandra v. Union of India*, (1952-54) 2 C.C. 587 (589); (1953) S.C.R. 655.

21. *Brishkshore v. Shrivastava*, A. 1956 All. 417.

22. *Balmik v. State of M. P.*, A. 1959 M.P. 407.

23. Cf. *Kamala v. Calcutta University*, A. 1956 Cal. 563 (567).

24. *University of Calcutta v. Dipa Pal*, (1952) 56 C.W.N. 730.

25. *Tapendra v. University of Calcutta*, A. 1954 Cal. 141.

1. *Hemendra v. Gauhati University*, (1953) 58 C.W.N. 54.

2. *Asha Lata v. Principal*, A. 1959 All. 224.

3. *Anand v. Govt. of M. P.*, A. 1959 All. 265.



act complained of is clearly beyond jurisdiction or against the rules of natural justice,<sup>4</sup> or there is a statutory duty which the authority has failed to perform.<sup>5, 6</sup>

3. Nor will the Court interfere where the matter is left to the discretion of the authorities,<sup>7</sup> e.g., in the matter of selection for admission, there being no statutory rules governing the matter.<sup>8</sup>

### C. Election.

In this matter, a distinction should be made between elections held under the Constitution, to which the provisions of Art. 329 (b) are attracted, and those held under other laws :

#### (A) Elections under the Constitution :

By reason of Art. 329 (b), as interpreted by the Supreme Court,<sup>9</sup> neither the Supreme Court nor a High Court has any power to interfere with the procedure of election. But when an 'election dispute' comes before the Election Tribunal, mandamus may issue if the Tribunal refuses to exercise its jurisdiction, as in the case of any other quasi-judicial Tribunal (see p. 388, *ante*)

#### (B) Elections under other laws :

I. The general rule is that the right of franchise created by a statute is governed by the provisions thereof, and, if the statute provides a remedy, that remedy must be followed, at least in the first instance, before invoking the jurisdiction under Art. 226.<sup>10</sup>

#### Illustration.

A writ would not issue to set aside an election where the Petitioner may have his remedy by an election petition, e.g., under s. 22 of the C. P. & Berar Local Government Act, 1948.<sup>11</sup>

II. But the existence of a statutory remedy is no bar to Mandamus—

Where the ground on which relief is sought is beyond the competence of the statutory tribunal to entertain, e.g.,

That the entire Electoral Roll has been prepared in contravention of the statute or the rules made thereunder.<sup>12</sup> In such a case, the Court may issue Mandamus directing the respondents not to give effect to the said Electoral Rolls and also to draw up proper Rolls in conformity with the law.<sup>13</sup>

### D. Government and its officers.

1. Mandamus will issue when the appropriate Government or its officers either overstep the limits of their power conferred by statute or fail to comply with the conditions imposed by statute for the exercise of the power.<sup>14</sup> In other words, it will issue to quash an *ultra vires* order.<sup>15, 16</sup>

4. *Sudarsan v. Allahabad University*, A. 1953 All. 194.

5. *Board of Education v. Ram Krishna*, A. 1959 All. 226.

6. *Kamala v. Calcutta University*, A. 1956 Cal. 563 (569)

7. *Anand v. Govt. of M. P.*, A. 1959 M.P. 265.

8. *Ponnuswami v. Returning Officer*, (1952) S.C.R. 218; *Hari Vishnu v. Ahmad*, A. 1955 S.C. 233 : (1955) 1 S.C.R. 380.

9. *Amulya v. Basirhat Municipality*, A. 1959 Cal. 548.

10. *Hari Prasad v. State of M. P.*, A. 1959 M.P. 343 (F.B.).

11. *Cooverjee v. Excise Commr.*, A. 1954 S.C. 220.

12. *Cf. S. K. Das v. Dt. Magistrate*, A. 1955 Assam 84.

13. *Marbanjang v. Cotton*, A. 1956 Assam 162.

*Illustrations.*

Mandamus has been issued—

(i) To restrain an Election Authority from holding an election on the basis of an electoral roll which was not in conformity with the requirements of the statute.<sup>13a</sup>

(ii) To quash the order of removal of a member of a Municipal Board contrary to the statutory condition.<sup>13b</sup>

(iii) Holding that the rights of the Petitioners under certain contracts were not 'proprietary rights', and that, accordingly, the State had no right to have such rights transferred to itself under the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, a writ was issued prohibiting the State Government from interfering in any manner with the enjoyment of the aforesaid rights of the Petitioners in exercise of the powers conferred by the said Act.<sup>13c</sup>

(iv) Holding that the Government has no power to cancel or supersede a reference made under Art. 10 (1) of the Industrial Disputes Act, 1947, the Court issued a writ of *mandamus* upon the Government not to give effect to its order of supersession and also directed that the Industrial Tribunal concerned should dispose of the reference as expeditiously as possible.<sup>13d</sup>

2. 'Statute' in this context, of course, includes subordinate legislation which has the force of law. Where Government have framed certain Rules under statutory power, laying down a procedure or conditions for doing a thing (e.g., for holding a public auction) Government is not free to adopt *ad hoc* procedure in particular cases, departing from such rules.<sup>14</sup>

3. The power to issue mandamus against administrative orders is governed by the following principles:

(i) *Mandamus* will issue—

Where the law under which the order has been issued (e.g., an order cancelling a licence<sup>15</sup> or a notice not to hold a market<sup>16</sup> or to pay or to submit return for payment of a tax)<sup>17</sup> is unconstitutional.

But—

(a) *Mandamus* will not issue to enforce an executive notification or order which has no statutory force, e.g., a press notification;<sup>18</sup> the rules of an administrative manual.<sup>19</sup>

(b) *Mandamus* does not issue against ministerial officers.

(ii) Where the act of the Government itself contravenes a fundamental right or other mandatory provision of the Constitution (see p. 386, *ante*).

**E. Government officer** [See p. 387, *ante*].

#### **F. Licensing.**

Except where a statutory provision has been violated, the Court will not issue *mandamus* to interfere with the exercise of a discre-

13a. *Chhotabhai v. State of M. P.*, A. 1953 S.C. 108 (111); [Actual decision disapproved in *Mahadeo v. State of Bombay*,

13b. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018.

13c. *Chief Commr. v. Radhey Shyam*, 1957 S.C.R. 67 (77); A. 1957 S.C. 304.

13d. *Purushottam v. State of U. P.*, A. 1959 All. 26.

14. *Guruswamy v. State of Mysore*, A. 1954 S.C. 592.

15. *Dwarkan Prasad v. State of U. P.*, (1954) S.C.R. 803.

16. *Tahir Hussain v. D.I. Board*, A. 1954 S.C. 630.

17. *Himmattal v. State of M. P.*, (1954) S.C.R. 1122.

18. *Ved Prakash v. I. T. Commr.*, A. 1956 All. 711.

19. *Rameshwar v. Pilbhit Municipality*, A. 1958 All. 841; *Nirankar v. Director of Industries*, A. 1959 All. 681.



tionary power to grant or refuse a licence.<sup>20</sup> But *mandamus* will lie if a licence is revoked in violation of statutory conditions.<sup>21a</sup>

### G. Municipality and similar local bodies.

*Mandamus* may issue against a statutory local authority, in the following cases, *inter alia*—

(i) To direct it to proceed according to law in the matter of election.<sup>21</sup>

(ii) To forbear from giving effect to a distress warrant which was issued in contravention of statutory provisions as well as to restore goods seized in execution of such unlawful warrant.<sup>22</sup>

(iii) To prevent the public funds being diverted to purposes other than those authorised by the governing statute.<sup>23, 24</sup>

(iv) To direct it not to enforce an *ultra vires* or unconstitutional bye-law against the Petitioner.<sup>25</sup>

(v) To direct it to exercise a power involving a public duty.<sup>1</sup>

### H. Public auction.

A. When a public auction is held under statutory provisions, the auction must be held in conformity with the requirements laid down by such provisions.<sup>2</sup> In case of violation of such requirements *mandamus* will issue at the instance of anybody interested in the auction.<sup>3</sup>

B. In the absence of a specific statutory provision—

(a) The highest bidder has no legal right to have his bid accepted and it is at the discretion of the authorities to accept a lower bid,<sup>2, 4</sup> because it is open to the Government to enter into contracts with whomsoever they please.<sup>4</sup>

(b) (i) Though the State may impose reasonable conditions for being eligible to bid at an auction, the Executive can have no discretionary power to exclude any person from bidding at a public auction,<sup>2, 4</sup> or to prevent him from continuing to bid at a particular stage.<sup>4</sup>

(ii) *Mandamus* will lie if any condition is *ultra vires* or without jurisdiction.<sup>4</sup>

### I. Revenue Authority.

*Mandamus* may issue against a Revenue authority—

(a) to direct a reference to the High Court under s. 57 of the Stamp Act,<sup>4, 7</sup> or under s. 51 of the Income Tax Act,<sup>8</sup> or under s. 18 of the Land Acquisition Act.<sup>9</sup>

20. *Om Prakash v. Commr. of Police*, (1960) 1 M.L.J. 22n.

20a. *In re State of Madras*, A. 1957 Mad. 692.

21. *Sawday v. N. Singh Roy*, A. 1946 Cal. 206.

22. *Mehar Singh v. Bally Municipality*, A. 1954 Cal. 131.

23. *Municipal Corpn. v. Govind*, A. 1949 Bom. 229.

24. *Narendra v. Corpn. of Calcutta*, A. 1960 Cal. 102 (111).

25. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

1. *Ranganayakulu v. Vijayawada Municipality*, A. 1959 A.P. 460.

2. *Guruswamy v. State of Mysore*, (1952-4) 2 C.C. 465 : (1955) 1 S.C.R. 305.

3. *Jagat v. State of Bihar*, A. 1955 Pat. 483.

4. *Kannappa v. Dt. Forest Officer*, (1958) 2 M.L.J. 268.

5. *Vellayan v. Dt. Forest Officer*, (1960) 1 M.L.J. 434 (438).

6. *Saradambal v. C. C. R. Authority*, A. 1960 Mad. 21.

7. *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills*, (1950) S.C.R. 536.

8. *Alcock, Ashdown & Co. v. Chief Revenue Authority*, (1923) 50 I.A. 227.

9. *Seshachalam v. Dt. Collector*, A. 1957 Andhra 687.

### J. Statutory Authority.

1. *Mandamus* will issue against a statutory authority to prevent the enforcement of

(i) an *ultra vires* order, e.g., where a Board of Religious Trusts called upon the trustees of a private trust to file statements of income and expenditure, under a law which did not apply to private trusts.<sup>10</sup>

(ii) an unconstitutional law,<sup>11</sup> e.g., a law for settling a scheme in regard to a religious institution which violates the rights of the head of the institution under Art. 19(1)(f).<sup>12</sup>

2. It will also issue to compel a statutory authority to proceed according to law where he has failed in his duty under the statute, e.g., where the Income-tax Officer failed to modify the assessment, while acting under s. 23(5)(b) of the Act,<sup>13</sup> or impounded books of account in contravention of the provisions of s. 37(2).<sup>14</sup>

### K. Taxation.

*Mandamus* lies for directing a revenue authority not to levy or collect an illegal or unconstitutional tax,<sup>15</sup> even though the assessment has become 'final' under the statute.<sup>16</sup>

## PROHIBITION

### Prohibition, nature of.

Prohibition is a judicial writ, issuing out of a superior Court to an inferior Court, preventing the inferior Court from *usurping jurisdiction* with which it is not legally vested, or in other words, to compel Courts with judicial duties to keep within the limits of their jurisdiction.<sup>17</sup>

### General Principles governing Prohibition.

(i) There must be a legal provision prohibiting an act before a writ of prohibition may issue against the doing of such act.<sup>18</sup>

(ii) The act must be judicial or quasi-judicial, as distinguished from administrative.<sup>19</sup>

### How far existence of alternative remedy bars prohibition.

1. Where want of jurisdiction is patent on the face of the record, prohibition issues as a matter of course, unless an *irresistible* case for withholding the writ is made out.<sup>20,22</sup>

2. Similarly, *waiver* or *acquiescence*, i.e., the failure to raise the objection before the inferior Tribunal is no ground for refusing Prohibition where the defect of jurisdiction is patent on the face of the record.<sup>21</sup> This rule applies even if the application is merely to avoid payment of the costs of the applicants' own vexatious suit.<sup>23</sup>

10. *Ram Saroop v. Sahi*, A. 1959 S.C. 951 (1960).

11. *Jagannath v. State of Orissa*, (1954) S.C.R. 1046.

12. *Sarup Chand v. Union of India*, A. 1959 S.C. 1207 (1214).

13. *Kanodia Bros. v. Seth*, A. 1959 All. 705.

14. *Sethi Bros. v. Asst. Collector*, A. 1959 Assam 136 (139).

15. *Rayalseema Constructions v. Dy. C.T.O.*, A. 1959 Mad. 382.

16. *Shriram Mull v. Commr.*, A. 1952 Mad. 613 (631).

17. *Sondhi v. Acctt. General*, A. 1952 Punj. 351.

18. *Southern Transports v. K. M. Union*, A. 1960 Mad. 365.

19. *Prasar v. Dwarkadas*, A. 1956 Bom. 530.

20. *Cholabhai v. Union of India*, A. 1952 Nag. 139.

21. *Lingalah v. Co-operative Society*, A. 1957 Andhra 98.

22. *Prabhudaya v. State of Punjab*, A. 1959 Punj. 460 (461).

23. *Halsbury*, 3rd Ed., Vol. 11, para. 222.



### Prohibition against unconstitutional proceeding.

In India, unconstitutionality is an additional ground upon which Prohibition may be issued against a quasi-judicial authority from proceeding further, e.g.,

(a) Where the law which gives jurisdiction to the tribunal is unconstitutional.<sup>24</sup>

(b) Where the proceeding is *ultra vires*, e.g., entertaining an application for a temporary permit during the pendency of applications for new permits, in contravention of the Proviso to s. 62 of the Motor Vehicles Act, 1939.<sup>25</sup>

### Cases in which Prohibition is issued.

Since both *certiorari* and prohibition have the same object in view, viz., the prevention of usurpation of jurisdiction by judicial and quasi-judicial bodies, the primary difference between the two writs being as to the stage at which the writ is available, it follows that the grounds on which prohibition will issue are the same on which *certiorari* will issue (if the Petitioner comes to court after the tribunal has already made the order without jurisdiction). Thus, prohibition will issue to prevent the tribunal from proceeding further, when the tribunal—

(a) proceeds to act without or in excess of jurisdiction;<sup>1</sup>

(b) proceeds to act in violation of the rules of natural justice;<sup>2</sup>

(c) proceeds to act under a law which is itself *ultra vires* or unconstitutional.<sup>3</sup>

(d) proceeds to act *mala fide*, having a personal interest in the cause.<sup>4</sup>

### Limits to the writ of Prohibition.

1. Prohibition will lie only against judicial or quasi-judicial proceedings and not against the exercise of legislative or executive functions, or against private persons<sup>5</sup> or associations.<sup>6</sup> In short, a writ of Prohibition is available only against such authorities as are amenable to the jurisdiction of *certiorari*.

2. A writ of prohibition can be issued only so long as the proceedings are pending before the inferior court or tribunal and cannot issue after the court or tribunal has ceased to exist or become *functus officio*.<sup>7</sup>

3. Prohibition is not available where the inferior tribunal has jurisdiction but exercises it irregularly<sup>8</sup> or erroneously.<sup>9</sup>

### Prohibition and certiorari.

The difference between the scope of the two writs has been fully

24. *Suraj Mall v. Visvanatha*, A. 1954 S.C. 545; *Meenakshi Mills v. Visvanath*, A. 1955 S.C. 13; taxing law *ultra vires* [*Peare Lal v. State of Punjab*, A. 1958 S.C. 664].

25. *Harī Narayan v. R.T.A.*, A. 1959 Pat. 248.

1. *Karam Singh v. Custodian*, A. 1951 Simla 171.

2. *Manak Chand v. Municipal Council*, A. 1951 Raj. 139.

3. *Sales Tax Officer v. Budh Prakash*, (1955) 1 S.C.R. 243; *Commr. v. Lakshmindra*, (1954) S.C.R. 1005.

4. *Asiatic Engineering Co. v. Achhru Ram*, A. 1957 All. 746.

5. *Hongkong Banking Corpn. v. Bhatdas*, A. 1951 Bom. 158.

6. *Ibrahim v. A. I. S. Workers' Union*, A. 1955 Cal. 189.

7. *Harī Vishnu v. Syed*, (1955) 1 S.C.R. 1104 (1117).

8. *Narayana v. I.T.O.*, A. 1959 S.C. 213 (219).

9. *Afghan Commercial Co. v. Union of India*, A. 1953 Punj. 225.

explained by the Supreme Court in *Hari Vishnu v. Syed Ahmad*,<sup>10</sup> as follows :

1. Both writs of prohibition and *certiorari* have for their object the restraining of inferior courts or tribunals from exceeding their jurisdiction and they could be issued not merely to courts but to all authorities exercising judicial or quasi-judicial functions. But there is one fundamental distinction between the two writs : They are issued at different stages of the proceedings. When an inferior court *takes up for hearing* a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue *forbidding* the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and *gives a decision*, the party aggrieved would have to move the superior court for a writ of *certiorari* and on that an order will be made *quashing* the decision on the ground of want of jurisdiction.

2. It might happen that in a proceeding before an inferior court a decision might have been passed which *does not completely* dispose of the matter, in which case it might be necessary to apply both for *certiorari* and prohibition—*certiorari* for quashing what had been decided and prohibition for arresting the further continuance of the proceeding.

3. Where a decision has been given, prohibition will not lie unless there are pending proceedings for *enforcement* of that decision or proceedings consequential on the decision, the continuance of which may be prohibited. But if there are no such proceedings pending, it is too late to issue prohibition and *certiorari* is the proper remedy to resort to.

#### Whether joint petition lies.

When the right whose violation is alleged is an individual right of each of several persons, they must bring separate applications for Prohibition, even though the proceedings sought to be restrained be the same, e.g., a proceeding relating to the same industrial dispute before an Industrial Tribunal.<sup>11</sup>

#### Scope of an order of Prohibition.

1. The object of Prohibition being to prevent an inferior tribunal from usurping jurisdiction which does not belong to it, the writ will not issue to correct mere errors or irregularities in the exercise of jurisdiction. In other words, where the tribunal has authority to do the act, but the manner of doing it is erroneous or improper, the writ will not lie. This is what is meant by saying that the writ of Prohibition cannot be used to serve the purposes of an appeal.<sup>12</sup>

2. Where the proceedings of the inferior tribunal are partly within and partly without its jurisdiction, prohibition will lie only against doing what is in excess of its jurisdiction.<sup>13</sup>

**Costs in a proceeding for Prohibition.** —See under *certiorari*, *post*.

### CERTIORARI

#### Certiorari, nature of.

Whenever any body of persons (a) having legal authority, (b) to determine questions affecting rights of subjects and (c) having the duty to act judicially, (d) act in excess of their legal authority, *certiorari*

10. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

11. *Ganapathi v. State of Madras*, (1957) 2 M.L.J. 54; *Raja of Ramnad v. State of Madras*, (1957) 2 M.L.J. 145.

12. *Afghan Commercial Co. v. Union of India*, A. 1953 Punj. 225.

13. *Sewpujaurai v. Collector of Customs*, A. 1958 S.C. 845 (1955).



may issue,<sup>1</sup> to remove the proceedings from such body to the High Court and to quash a decision that goes beyond jurisdiction.

The object of this writ is to keep the exercise of powers by judicial and quasi-judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain them from acting in excess of their authority.<sup>2</sup>

### Conditions necessary for issuing Certiorari.

When any body of persons (a) having legal authority, (b) to determine questions altering rights of subjects, (c) having the duty to act judicially, (d) act in excess of their legal authority,—a writ of *certiorari* may issue. Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to *certiorari*.<sup>3</sup>

I. *The tribunal must have legal authority.*—*Certiorari* does not issue where the proceedings of the inferior tribunal are not merely voidable but are absolutely null and void, for in such a case, no benefit will arise from the issue of the writ, e.g., (a) where an altogether unauthorised person has purported to act in a judicial capacity, or (b) where the proceedings of the tribunal have already become void by the operation of a statute.

The object of *certiorari* and prohibition is to restrain a tribunal established by law from usurping a jurisdiction which has not been conferred by the Legislature. When a person or body of persons has no legal authority to act as a tribunal, its acts are void *ab initio* and these need not be quashed by *certiorari*.<sup>4</sup>

II. *The tribunal must have the duty to act judicially.*—The writ of *certiorari* does not issue against executive acts or even ministerial acts of a judicial authority. It is issued only if the act done by the inferior body or authority is a 'judicial' act, which term includes the concept of a 'quasi-judicial' act.<sup>5</sup> *Certiorari* is not available against administrative orders.<sup>6</sup>

III. The judicial or quasi-judicial authority must act (a) without or in excess of jurisdiction; or (b) in contravention of the rules of natural justice, or (c) commit an error apparent on the face of the record.

In order that *certiorari* may lie, the tribunal must have acted without jurisdiction or in excess of the jurisdiction conferred upon it by law.<sup>7</sup> Defect of jurisdiction must be distinguished from defect in mere procedure. (As to when a tribunal may be said to act without or in excess of jurisdiction, see under next caption, p. 403, *post*).

(A) Once an order is made by a tribunal without jurisdiction, that order becomes liable to the writ jurisdiction of the Court, even though the decision of the tribunal requires the sanction of a higher authority who may not be amenable to the writ jurisdiction. Where the responsibility for the passing of a particular kind of order is by statute vested in a specified authority but such an order was passed by a different authority, the fact that the proper appellate authority affirmed the original order does not cure the invalidity thereof.<sup>8</sup>

(B) On the other hand—

1. *Prov. of Bombay v. Khusaldas*, (1950-51) C.C. 189 (191) : (1950) S.C.R. 621.

2. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459 (518).

3. *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96.

4. *Asstt. Collector v. Soorajmull*, (1952) 56 C.W.N. 452.

5. *State of Bihar v. Ganguly*, A. 1958 S.C. 1018 (1026).

6. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621.

7. *Ramchandra v. Sankaramma*, (1956) S.C.A. 636 (661).

1. When the inferior tribunal has jurisdiction to decide the matter, *certiorari* will not issue, even though—

(i) there is no right of appeal or other remedy against the order complained of;<sup>8</sup>

(ii) there will be inconvenience to the party aggrieved unless *certiorari* is issued;<sup>9</sup>

(iii) the finding of the tribunal be *erroneous* in fact,<sup>9</sup> or the tribunal has acted without sufficient evidence or has misdirected itself in considering the evidence; or has admitted legal evidence or rejected legal evidence or has misconstrued a statute.<sup>10</sup> In other words, *certiorari* does not lie for an erroneous decision in respect of a matter which is within the jurisdiction of the inferior tribunal unless such erroneous decision relates to anything *collateral*, an erroneous decision upon which might affect jurisdiction,<sup>11</sup> and the statute does not confer upon the tribunal final jurisdiction to decide such question, which is technically known as a 'jurisdictional' question.

The Court issuing a writ of *certiorari* acts in a *supervisory* and not *appellate* jurisdiction.<sup>12</sup> In cases of mere erroneous decision within jurisdiction, remedy lies only under the procedure prescribed by the law for setting matters right.<sup>13</sup> Acting under art. 226, the High Court cannot convert itself onto a court of appeal.<sup>14</sup> Hence, it cannot interfere with a finding of fact, unless it is shown to be *wholly* unsupported by evidence.<sup>15</sup>

(iv) On the same principle, *certiorari* will not issue to correct a mere error of law,<sup>16</sup> except where is an 'error apparent on the record',<sup>17</sup> which means that (a) there must be something more than a mere error; (b) such error must be 'apparent on the face of the record'. [As to when an error may be said to be 'apparent on the face of the record', see *post*].

2. But even where the tribunal has acted within its jurisdiction, *certiorari* will lie in the following cases of complete failure of justice:

(a) Where the determination is arrived at *mala fide*.<sup>18,19</sup>

(b) Where the order of the inferior tribunal has been obtained by fraud, collusion or corruption.<sup>20</sup>

(c) Where the tribunal has acted contrary to the principles of natural justice,<sup>21</sup> e.g., adjudging a person guilty without giving him opportunity of being heard.<sup>22</sup>

(d) Where there is an error apparent on the face of the record.<sup>23</sup>

IV. The tribunal whose order is sought to be quashed must be inferior to the Court<sup>24</sup> before which *certiorari* has been applied for.—No Court can issue *certiorari* to quash an order made by itself or a Court<sup>25</sup> of equal status or co-ordinate jurisdiction or against an independent tribunal. For the same reason, a High Court cannot issue a writ of *certiorari* against itself on its administrative Side, e.g., to quash an order of refusal to enroll the Petitioner as an Advocate.<sup>26</sup>

8. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621.

9. *Hari Vishnu v. Syed Ahmad*, (1955) 1 S.C.R. 1104.

10. *Parry & Co. v. Commercial Employees' Assocn.*, (1952) S.C.R. 519 (524); *Ebrahim v. Custodian of Evacuee Property*, (1952) S.C.R. 696 (702).

11. *Veerappa v. Ramn*, (1952) S.C.R. 583.

12. *D. C. Works v. State of Rajasthan*, A. 1957 S.C. 264 (269).

13. Halsbury, Hailsham Ed., Vol. IX, para. 1493.

14. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

15. *Mohasinali v. State of Bombay*, A. 1951 Bom. 303.

16. *Asstt. Collector v. Soorajmull*, (1952) 56 C.W.N. 452 (465).

17. *Janardhan v. State of Hyderabad*, (1951) S.C.R. 344.

18. *In re Babul Chandra*, A. 1952 Pat. 309.



But the Excise Appellate Authority under the East Bengal and Assam Excise Act, 1910 is not a tribunal of co-ordinate jurisdiction with the High Court for the present purpose, even though the highest appellate powers as regards revenue cases are vested in him.<sup>19</sup>

V. *The tribunal whose order is sought to be quashed or the authority from whose custody the record is called for, must be within the jurisdiction of the High Court.*—The Tribunal whose order is sought to be quashed must be situated within the jurisdiction of the High Court before whom *certiorari* is sought.<sup>20</sup>

But the existence of the Tribunal at the date of issue of *certiorari* is not essential. The fact that a tribunal has become *functus officio* is no bar to the issue of *certiorari* to quash its decision. The writ being against the record, it can be issued to whosoever has the custody thereof.<sup>21</sup>

But the writ cannot issue if the person who has the custody of the record is outside the jurisdiction of the High Court.<sup>22</sup> Thus, after the Labour Appellate Tribunal at Lucknow has been abolished and the records removed to Bombay the High Court of Allahabad cannot issue *certiorari* to quash a decision of that Tribunal.<sup>23</sup>

On the other hand, if the person in whose custody the record is, being within the jurisdiction of the Court, has been named in the petition, it cannot be defeated on the ground that the present incumbent of the office which issued the order complained of has not been impleaded in the petition.<sup>24</sup>

#### **Certiorari on constitutional grounds.**

In India, *certiorari* is available against a quasi-judicial decision on additional ground that the decision is unconstitutional, e.g.

(i) Where the decision offends a fundamental right.<sup>25</sup>

(ii) Where the law which gives jurisdiction to the tribunal is unconstitutional.<sup>26</sup>

#### **When does a tribunal act without or in excess of jurisdiction.**

Want of jurisdiction may arise in any of the following ways—

(i) It may arise from the nature of the subject-matter, so that the inferior court or tribunal might not have authority to enter on the inquiry or upon some part of it.<sup>1</sup>

#### *Illustrations.*

The Gauhati University Act deals with the offices of 'teacher' and 'Principal' as separate capacities and empowers the University to interfere with the action taken by the Governing Body of a College against a 'teacher' and not a 'Principal'. The Governing Body of a College dismissed a person who held the offices of Principal as well as a Professor of Mathematics, and this order was reversed by the University. Held, that the order of the University was without jurisdiction in so far as it interfered with the dismissal of the person from the office of Principal and must be set aside.<sup>2</sup>

19. *Nagendra v. Commr.*, A. 1958 S.C. 398 (407); (1958) S.C.R. 1240.

20. *Rashid v. I. T. I. Commr.*, (1954) S.C.R. 738.

21. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

22. *Bhawani v. Naqui*, A. 1956 Pat. 257 (268).

23. *E. S. & Co. v. Textile Mill Union*, A. 1958 All. 80 (84).

24. *Bidi Supply Co. v. Union of India*, A. 1956 S.C. 479 (484).

25. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (600; 643).

1. *Ebrahim v. Custodian of Evacuee Property*, (1952) S.C. 606 (706).

2. *J. K. Chaudhuri v. Dutta Gupta*, A. 1958 S.C. 722.

(ii) It may arise from the absence of some essential preliminary or upon the existence of some facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it.<sup>1</sup>

#### Illustration.

An Industrial Tribunal has no jurisdiction unless the dispute referred to it is really an 'industrial dispute'.<sup>2</sup> The determination of the Government or of the Tribunal on this question cannot be final.

(iii) The general rule is that a tribunal cannot give itself jurisdiction by wrongly deciding facts the existence of which is essential for the assumption of jurisdiction by the tribunal. But in the application of this rule, a distinction is to be made by two classes of tribunals which may be created by the Legislature :

(a) The Legislature may say that the tribunal shall have jurisdiction to decide a cause or matter only if a certain state of facts is shown to the tribunal to exist, but not otherwise. In such a case, it is not for the tribunal conclusively to determine whether that state of facts exists. If the tribunal exercises the jurisdiction without the existence of that state of facts, its decision of the cause or matter will be without jurisdiction and will be quashed by *certiorari*.<sup>3, 4</sup>

#### Illustration.

The jurisdiction of the Industrial Tribunal under s. 33A of the Industrial Disputes Act, 1947 depends upon the existence of the conditions mentioned in that section.<sup>5, 7</sup> Similarly, the question whether the employees before the tribunal are 'workmen' within the meaning of the Industrial Disputes Act is a jurisdictional issue, the finding on which is open to scrutiny in a writ of *certiorari*.<sup>6, 8</sup>

(b) The Legislature may confer on the inferior court or tribunal also the jurisdiction to determine whether the preliminary state of facts exists. In such a case, the decision of the tribunal cannot be challenged on the ground that the preliminary state of facts did not, in fact, exist. This case is, thus, an exception to the rule that a tribunal cannot give its jurisdiction by wrongly deciding certain facts.<sup>4, 8</sup>

#### Illustrations.

1. The Bihar Buildings' Lease (Rent and Eviction) Control Act (III) of 1947, sets up a complete machinery for eviction of a tenant on certain grounds, including non-payment of rent, and makes the decision of the Controller final, subject only to appeal to the Commissioner. The Act empowers the Controller to determine whether or not there has been non-payment of rent, and, upon that finding, to order eviction of the tenant. *Heid*, that the impugned Act confers upon the Controller final jurisdiction to determine the preliminary question whether there has been non-payment of rent, as well as the final question of eviction

3. *Newspapers Ltd. v. Industrial Tribunal*, A. 1957 S.C. 532 (539).

4. *Ebrahim v. Custodian General*, (1952-54) 2 C.C. 469 (471).

5. *Raman & Raman v. State of Madras*, A. 1956 S.C. 463 (466).

6. *Automobile Products v. Rukmafl*, A. 1955 S.C. 258.

7. *Bata Shoe Co. v. Ali Hasan*, A. 1956 Pat. 518 (521).

8. Cf. *Maharashtra Sugar Mills v. State of Bombay*, A. 1951 S.C.



so that his decision cannot be challenged in the Courts on the ground that the preliminary question has been wrongly decided.<sup>9</sup>

2. S. 63A of the Motor Vehicles Act, 1939, as amended in Madras, provides that "the State Government may, of its own motion or on application made to it, call for the records of any order passed or proceedings taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceedings and after examining such records, may pass such order in reference thereto as it thinks fit." *Held*, that in enacting this section, the Legislature clearly intended that the State Government was to decide the issue as to whether any order in question was illegal, irregular or improper and then pass such order as it thought fit. Hence, it would not be open to a Court exercising *certiorari* to intervene merely because it might be of the opinion that the view taken by the State Government as to the impropriety of the order was erroneous.<sup>10</sup>

3. S. 5 of the Bombay Land Requisition Act, 1948, which empowers the State Government to requisition a premises which has remained vacant for a particular period provides that the declaration of such vacancy by the State Government, after such enquiry as it deems fit, shall be 'conclusive evidence' of the fact of vacancy. *Held*, the finding of the State of Government on the question of vacancy cannot be challenged in a proceeding for *certiorari*, because the Legislature had conferred final power upon the Government to determine this question.<sup>11</sup>

(iv) Where a tribunal purports to exercise a power not given to it by the statute which created its jurisdiction,<sup>12</sup> or exercises the power in disregard of the conditions laid down by the statute for its exercise.<sup>13</sup>

#### Illustrations.

1. Where a Regional Transport Authority refuses a permit on considerations extraneous to s. 47 of the Motor Vehicles Act, his order is without jurisdiction.<sup>14</sup>

2. Under the Industrial Disputes Act, 1947, an Industrial Tribunal has been given power, when a dispute arises, to see whether the termination of service of a workman is justified and to give appropriate relief. In exercise of this power, however, the Tribunal cannot sit as a court of appeal and substitute its own judgment for that of the management. It can interfere where the management is guilty of (i) want of good faith; (ii) victimisation or unfair labour practice; (iii) a basic error or violation of a principle of natural justice; or (iv) when on the materials, the finding of the management is completely baseless or perverse.<sup>15, 16</sup>

It is to be noted in this connection that—

When a statute creates an appellate court or tribunal, without limiting its jurisdiction by providing that the exercise of its powers will depend on any particular state of facts<sup>17</sup> or on particular grounds,<sup>18</sup> the powers of the Appellate Tribunal would be co-extensive with those of the primary authority, so that it may not only quash the orders of

9. *Brij Raj v. Shaw & Bros.*, (1951) S.C.R. 145. A 1951 S.C. 115.

10. *Raman & Raman v. State of Madras*, A. 1956 S.C. 463 (467).

11. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (528).

12. *Nagendra v. Commr.*, A. 1958 S.C. 398 (408) : (1958) S.C.R. 1240.

13. *Islam v. State of Bihar*, A. 1956 Pat. 73.

14. *Indian Iron & Steel Co. v. Their Workmen*, A. 1958 S.C. 130 (138).

15. *McKenzie & Co. v. Its Workmen*, (1958) S.C. [C.A. 500/57].

16. *Ebrahim v. Custodian General*, (1952) S.C.R. 696 (704).

the primary authority on the ground of perversity or illegality but substitute its own decision on the matter before the primary authority, subject, of course, to the relevant provisions of the law.<sup>17</sup>

(v) When the tribunal is not properly constituted, it has no jurisdiction to hear the matter.<sup>17</sup>

(vi) Where the law which gives jurisdiction to the tribunal is itself void, there is an obvious absence of jurisdiction.<sup>18</sup>

### When the question of jurisdiction should be raised.

When a question of want of jurisdiction of the inferior tribunal is one of law and goes to the root of the matter,<sup>19</sup> it may be raised for the first time in an application under Art. 226.

But where it is a mixed question of fact and law, or the question of law depends upon proof of facts, the High Court would not allow it to be raised in a proceeding under Art. 226 unless it had been raised before the inferior tribunal itself,<sup>20</sup> or he can show that he was unaware of those facts when the matter was before the inferior tribunal.<sup>21</sup>

### Whether a quasi-judicial tribunal can review its own orders.

The general rule is that a quasi-judicial tribunal becomes *functus officio* as soon as it makes a decision relating to a particular matter. It cannot, therefore, review its decision, unless so empowered by statute.<sup>22</sup>

This does not mean that it is powerless to rectify its own mistakes, overlooking a change in the law which had taken place before its decision.<sup>23</sup>

### What is an 'error apparent on the face of the record'.

1. When the decision of an inferior tribunal is vitiated by an error 'apparent on the face of the record,' it is liable to be quashed by *certiorari*,<sup>24</sup> even though the Court may have acted within its jurisdiction.<sup>25</sup>

2. 'Error', in this context, means 'error of law'.<sup>26</sup> Where the Tribunal states on the face of the order the grounds on which they made it and it appears that in law these grounds were not such as to warrant the decision to which they had come, *certiorari* would issue to quash the decision.<sup>27</sup>

3. An 'error of fact' apparent on the face of the record may be a ground for review under O. 47, r. 1 of the C. P. Code but not for interference by means of *certiorari*, however gross the error may be.<sup>4</sup>

4. Interference on the ground of error apparent on the face of the record is an exception to the rule that, in exercising its power to issue *certiorari*, the Court cannot act as a court of appeal. This does not mean, however, that in exercise of this power, the Court issuing *certiorari* can interfere in case of every error of law which could be

17. *State of Rajasthan v. Mewar Mills*, (1954) S.C.R. 1129.

18. *Rajahmundry E. S. C. v. State of Andhra*, (1954) S.C.R. 779.

19. *Bhagirathi v. The State*, A. 1955 All. 113 (F.B.).

20. *Pannalal v. Union of India*, A. 1957 S.C. 397 (412); *Manak Lal v. Prem Chand*, A. 1957 S.C. 425; (1957) S.C.R. 575.

21. *Gopalan v. C. R. T. Board*, A. 1958 Ker. 341 (349); *Gandhinagar M. T. Society v. State of Bombay*, A. 1954 Bom. 202.

22. *Ramnath v. S. T. A.*, 1957 Pat. 117.

23. *Shib Prasad v. State of W. B.*, (1953) 63 C.W.N. 88.

24. *Hari Vishnu v. Ahmad*, (1955) 1 S.C.R. 1104 (1123).

25. *Nagendra v. Commr.*, A. 1958 S.C. 398 (412).



corrected by a court of appeal.<sup>24</sup> The purpose of *certiorari* on the ground of error apparent on the face of the record is to determine, on an examination of the record, whether the inferior tribunal has not proceeded in accordance with the essential requirements of the law which it was meant to administer.<sup>25</sup>

Thus,

(A) The Court will not, by *certiorari*, interfere with—

(a) Mere formal or technical errors, even though of law,<sup>1</sup> e.g., errors in appreciation of documentary evidence<sup>2</sup> or errors in drawing inferences from facts.<sup>3</sup>

(b) A decision on a question of law merely because two views are possible on such question.<sup>4</sup>

(B) But it will be issued where there is a patent error of law, manifest on the record, which goes to the root of the matter, e.g.—

Where it is based on a clear disregard of the provisions of law,<sup>5</sup> e.g., where the charge laid before a Magistrate, as stated in the information does not constitute an offence punishable by the Magistrate or where it does not amount in law to the offence of which the defendant is convicted or where an order is made which is unauthorised by the finding of the Magistrate;<sup>6</sup> or where the impugned order is founded on an obviously wrong interpretation of a statutory provision;<sup>7</sup> or where a material provision of law is overlooked.<sup>8</sup>

The error may also be due to a subsequent amendment of the law, with retrospective effect.<sup>9</sup>

5. It is, however, not easy to define how far the Court would be entitled to go for the purpose of determining whether there has been an 'error apparent on the face of the record'.<sup>10</sup> Broadly speaking, *certiorari* is available on the present ground only when the impugned order is a 'speaking order', i.e., an order which sets out the grounds of the decision and it appears that the grounds so stated were not such as to warrant the decision to which the inferior Court had come.<sup>11</sup>

6. Hence, in the majority of cases, an error could not be said to be apparent on the face of the record where it was not self-evident on the face of the record and required argument or evidence<sup>12</sup> or a long drawn process of reasoning<sup>13</sup> to establish it.

7. For the purpose of application of this principle, a record consists of the pleadings, if any, or the document which initiates the proceedings, and the adjudication, but not the evidence.<sup>14</sup> It would not include other subsidiary records, if any, called for by the Court itself.<sup>15</sup>

But there may be cases where this test would break down and the question whether there has been an error apparent on the face of the record must be left to be determined on the facts of each case.<sup>16</sup> Thus where the order incorporates<sup>17</sup> reference to other documents, the Court is

1. *Prem Singh v. Deputy Custodian General*, (1958) S.C.A. 24.

2. *Baluk v. Surat Municipality*, A. 1953 Bom. 133.

3. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

4. Cf. *Registrar v. Ishwari Prasad*, A. 1956 All. 603 (608).

5. *Nanag Ram v. Ghinsi Lal*, A. 1952 Raj. 107.

6. *Juwanshufi v. Tribunal*, A. 1957 Bom. 182 (185).

7. *Venkatachalam v. Bombay Dyeing Co.*, A. 1958 S.C. 875 (879).

8. *Hari Vishnu v. Ahmad*, (1955) S.C.R. 1104 : (1952-4) 2 C.C. 480 (486) : A. 1955 S.C. 233.

9. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

10. *Satyannarayan v. Mallikarjun*, A. 1960 S.C. 137 (142), reversing *Mallikarjun v. Satyanarayan*, A. 1953 Bom. 207.

11. *S. K. Dutt v. A.-I. Jute Mills*, A. 1957 Cal. 514 (520).

12. *Habib v. Bhikamchand*, A. 1954 Nag. 306.

not prevented from looking into them to determine whether there has been such an error.<sup>13</sup>

**Instances of 'error apparent on the face of the record'.**

(A) In the following cases, it has been held that the order of the tribunal or authority has been vitiated by an error apparent on the face of the record :

(i) Where the Collector, in deciding an appeal under the Jaipur Rent Control Order, committed a patent error in interpreting s. 1 (b) (i) of the Second Sch. of the Order.<sup>14</sup>

(ii) Where the Collector of Customs made an order of confiscation and fine in lieu thereof, under s. 167 (12A) of the Sea Customs Act, 1878, and it appeared on the face of the order that it was passed without taking into consideration factors which were material for imposing the penalty according to the statute.<sup>15</sup>

(iii) Where a tribunal acted upon an alleged admission, when the record shows it was only a denial.<sup>16</sup>

(iv) Where the taxing authority evidently made an assessment on mere guess-work, without any basis whatsoever.<sup>17</sup>

(B) On the other hand, in the following cases it has been held that there was *no* error apparent on the face of the record :

(i) A petition for declaring the election of the successful candidate void and holding the Petitioner elected on the ground of irregularity in commencing the polling at a centre half an hour later than the scheduled time and of corrupt practice on the part of the successful candidate, was allowed on both grounds. In an application for *certiorari*, it was urged that the finding that the result of the election was materially affected by reason of the late commencement of the polling was vitiated by an error apparent on the face of the record inasmuch as it was pure surmise so long as the exact number of voters who went away owing to the late commencement and the number of those out of such persons who would have voted for the Petitioner, were not known. *Held*, that if the Tribunal had declared the Petitioner to be the duly elected candidate merely upon the view that he would have got more votes than the successful candidate had the polling commenced in due time, there would, obviously, have been an error apparent on the face of the record. But the Tribunal, in fact, considered the fact of late commencement only as one of the circumstances in coming to a determination, under s. 100 (2) (c) of the Representation of the People Act, 1951 as to whether the violation of the statutory rule materially affected the result of the election, and the declaration in favour of the Petitioner specifically rested on the finding that the Petitioner could have secured the majority of votes but for the corrupt practice of the respondent. There was no error of law apparent on the face of the record in this latter finding which the Tribunal was competent to make under the law.<sup>18</sup>

(ii) The Bombay Revenue Tribunal rejected a landlord's application for possession on the ground that a previous notice required by s. 14 of the Bombay Tenancy and Agricultural Lands Act, 1948, had not been given. The order was challenged as being vitiated by an error of law.

13. *Abanindra v. Mazumdar*, A. 1956 Cal. 273 (275) F.B.

14. *Nanagram v. Ghinsilal*, A. 1952 Raj. 107 (109); also *Badamibai v. Tobin*, A. 1953 Nag. 16.

15. *Eveett Orient Line v. Jasjit*, A. 1959 Cal. 237.

16. *Harikishan v. Ramchandra*, A. 1953 Hydr. 56.

17. *D. C. Mills v. Commr. of I. T.*, A. 1955 S.C. 65; *Raghubar v. State of Bihar*, A. 1957 S.C. 810.

18. *Basappa v. Nagappa*, A. 1954 S.C. 440.



The Supreme Court refused *certiorari*, holding that the question whether such notice would be required in the facts of the case was a controversial one and required arguments to establish the error, if any. There might have been erroneous decision on a point of law, but it was *not apparent* on the face of the record.<sup>19</sup>

### Violation of the Principles of Natural Justice.

1. *Certiorari* will lie where a judicial or quasi-judicial authority has violated the principles of natural justice even though the authority has acted within its jurisdiction.

2. The requirements of natural justice vary with the varying constitution of the different quasi-judicial authorities and the statutory provisions under which they function. Hence, the question whether or not any rule of natural justice has been contravened in any particular case should be decided not under any pre-conceived notions, but in the light of the relevant statutory provisions.<sup>20</sup> This should be borne in mind while applying the general principles relating to natural justice.

3. The broad principles of natural justice are—

I. A quasi-judicial authority cannot make any decision adverse to any party without giving him an effective opportunity of meeting any relevant allegation against him<sup>21,22</sup>

This principle requires—

(a) That every person whose civil right is affected must have a *reasonable notice* of the case he has to meet;<sup>23</sup>

(b) That he must have a reasonable opportunity of being heard in his defence.<sup>24,25</sup>

A decision based on information gathered at the back of the party affected, without giving him an opportunity to rebut that information, or material, is opposed to the principles of natural justice.<sup>2,21</sup> But where a party, coming to know that the Tribunal was using a document, raised no objection that had no opportunity of rebutting it, nor asked for an adjournment to meet the statements made in the document, a superior Court would not entertain such objection at a later stage.<sup>2</sup>

This principle is also violated where the quasi-judicial authority, without exercising his own judgment and without giving the parties an opportunity of meeting the point of view adopted by a superior officer, gives his decision in accordance with instructions received from the superior officer.<sup>9</sup>

But—

1. But the duty to offer a reasonable opportunity of being heard does not include any obligation to hear a party in person<sup>4</sup> or by a lawyer.<sup>6</sup> Whether a personal hearing should be given or not will depend on the circumstances of each case.<sup>9,2</sup>

19. *Satyannarayan v. Mallikarjun*, A. 1960 S.C. 137 (142).

20. *N. P. T. Co. v. N. S. T. Co.*, (1957) S.C.R. 98.

21. *D. C. Mills v. Commr. of I. T.*, (1952-4) 2 C.C. 497 (499) : A. 1955 S.C. 65.

22. *Abul Azeer v. State of Mysore*, A. 1957 Mys. 12.

23. *Mukhar Singh v. State of U. P.*, A. 1957 All. 297 (301).

24. *Dipa Pal v. University of Calcutta*, A. 1952 Cal. 594.

25. *Gobardhan v. State of Bihar*, A. 1957 Pat. 341 (345).

1. *Chennappa v. State of Mysore*, A. 1956 Mys. 33.

2. *N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232 (242).

3. *Mahadaya v. Commercial Tax Officer*, A. 1958 S.C. 667 (671).

4. *In re Shaunmugam*, (1950) 2 M.L.J. 399.

5. *Mulchand v. Mukund*, A. 1952 Bom. 296.

6. *Mahabir Motor Co. v. State of Bihar*, A. 1956 Pat. 437.

7. *Abdul Azeer v. State of Mysore*, A. 1957 Mys. 12.

8. *Balagangadharan v. C. R. T. Board*, A. 1957 T.C. 141.

2. There may be exceptional cases where opportunity to be heard cannot be given in the public interest, before taking action, e.g.,

(a) Where a building or similar structure is in imminent danger of collapsing and the municipal authority is obliged to pull it down immediately in the interest of public safety, or the safety of the inmates of the house.<sup>9</sup>

(b) Where immediate orders are necessary to meet an emergency, e.g., for the maintenance of public order.<sup>10</sup>

II. It is of the essence of judicial and quasi-judicial decisions that the authority making such decisions should be able to act impartially, objectively and without any bias.<sup>11,12</sup> This principle is violated when the judicial or quasi-judicial authority is interested in the cause before him. Such interest may be of three kinds—

(a) He may have a direct connection with the litigation, without having any pecuniary or other personal interest. Thus, a Judge who is himself a party or has personal knowledge of the facts of a case<sup>13</sup> or who has examined himself as a witness in a case,<sup>14</sup> should not hear it.

This principle is otherwise expressed as

"A person must not be a judge in his own cause" or "the prosecutor shall not also be the judge". The word 'prosecutor' has been rather narrowly interpreted by the Supreme Court in *Hari v. Dy. Commr.*,<sup>15</sup> but it has been rightly pointed out that the principle is not violated unless the power of making the order complained of is placed in the hands of the authority who launches the proceeding.<sup>16</sup> Where the proceedings are initiated as well as the evidence is collected by the Police but the actual order of externment is to be made by a Magistrate "if he has reason to believe that such person is likely to engage himself in the commission of an offence", held, there was no denial of the above principle of natural justice.<sup>17</sup>

The principle is not confined to Judges but extends to any authority vested with quasi-judicial functions.<sup>18</sup>

### Illustrations.

(i) The Secretary to the State Transport Department, as the head of the Department, is disqualified from hearing objections of private operators, under the Motor Vehicles Act, to the schemes framed by the Transport Department as the statutory Undertaking created by the Act.<sup>19,20</sup>

(ii) At the same time, it has been held<sup>21</sup> that the Minister in charge of the Transport Department is not disqualified to hear the same objections, on the ground that while the Secretary forms a part of the Department, the Minister does not.<sup>22</sup> Minister is only a member of the Council of Ministers which, as a body, advises the Governor, and a Minister is only responsible for the disposal of business in a particular Department.<sup>23</sup>

(b) He may have a pecuniary interest in the cause, in his personal (as distinguished from official)<sup>24</sup> capacity.

Pecuniary interest, however, small, would wholly disqualify a person from acting as a judge.<sup>25</sup>

9. *Ajoy Kumar v. Calcutta Corporation*, A. 1956 Cal. 411.

10. *Rapurao v. State*, A. 1956 Bom. 300 (302).

11. *Manak Lal v. Prem Chand*, A. 1957 S.C. 425 (429).

12. Cf. C3, Vol. I, pp. 103-5.

13. *Hurpurshad v. Sheo Dyal*, 3 I.A. 250 (286).

14. *Moti Lal v. State*, A. 1951 All. 257 (F.B.).

15. *Hari v. Dy. Commr.*, A. 1956 S.C. 559 (567).

16. *Nageswararao v. State of A.P.*, A. 1959 S.C. 1376 (1378).

17. *Nageswara v. A. P. S. R. T. Corpn.*, A 1959 S.C. 308 (326).



(c) Even where there is no pecuniary interest, a Judge may have a *personal* bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. The causes which may lead to personal bias cannot be exhausted. But the facts constituting personal bias must be alleged and proved to the hilt.<sup>17a</sup>

While in cases (a) and (b) the Judge is absolutely disqualified, where bias is alleged, it becomes to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. But even in case (c), the test is not whether in fact a bias *has affected* the judgment; the test is whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal *might have operated* against him in the final decision of the Tribunal.<sup>17b</sup> The test is a 'real likelihood' of operative prejudice, conscious or unconscious.<sup>17c, 18</sup>

#### Illustration.

The appellant, an Advocate, was the Pleader for the applicant in a s. 145 (Cr. P. C.) proceeding, while C was engaged on behalf of the opposite party. A Bar Council Tribunal was appointed to inquire into an alleged misconduct of the appellant arising out of the s. 145 proceeding and C was appointed Chairman of that Tribunal. *Held*, that the appellant was entitled to contend that the Tribunal was not properly constituted, without actual proof of any prejudice on the part of C.<sup>19</sup>

Another limitation which comes into operation where bias (as distinguished from pecuniary interest) is alleged is the doctrine of *waiver*. The alleged bias in a member of a Tribunal does not render the proceedings valid if it is shown that the objection against the presence of the member in question was not taken by the aggrieved party, at the earliest opportunity after coming to know of the circumstances giving rise to the alleged bias and of his right to challenge the presence of the member in the Tribunal.<sup>17b</sup>

Where a tribunal consists of several members, bias on the part of one of the members is sufficient to vitiate the decision.<sup>19</sup>

4. Though there is agreement about the above fundamental principles, there may be variation as to the detailed application of the above rules according to the nature of the functions of different quasi-judicial bodies and the provisions of the statutes constituting them.<sup>20</sup>

#### What makes a decision judicial or quasi-judicial.

In *Prov. of Bombay v. Khusaldas*,<sup>20a</sup> the majority concurred on the proposition that a decision is judicial or quasi-judicial only if the law under which the decision is made, itself *requires* a judicial approach; in other words, the duty to act judicially must be laid down in the law itself.

But Das J. (as he then was) took a wider view and distinguished between two classes of cases: in one of them the quasi-judicial obligation arises from the nature of the dispute and in the other it arises from specific statutory requirement. This view, reiterated by him, speak-

17a. *Venkatachalam v. State of Madras*, A. 1957 Mad. 623 (626).

17b. *Manaklal v. Premchand*, A. 1957 S.C. 425 (429).

17c. *Bhusan v. Onkar*, A. 1956 All. 715 (718).

18. *Iqbal Singh v. Collector*, A. 1956 Punj. 235.

19. *Narayana v. State of A. P.*, A. 1958 A.P. 636 (637).

20. *Nageswara v. A. P. S. R. T. Corpn.*, A. 1959 S.C. 308.

20a. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621: A. 1950 S.C. 222.

ing for the majority in the recent case of *Radheshyam v. State of M.P.*<sup>21</sup> is as follows—

(i) if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) if a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of the two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially.<sup>22</sup>

(A) *As to statutory obligation to act quasi-judicially—*

1. Whether an administrative authority has to function in a quasi-judicial capacity must be determined in each case, on an examination of the relevant statute<sup>23</sup> as well as the rules<sup>24</sup> framed thereunder.

2. Where the authority is required by the statute to act judicially, the decision will be quasi-judicial even though one of the parties to the contest is the authority himself.<sup>25</sup>

3. The essential elements of a judicial approach are—giving an opportunity to the party who is affected by an order to make a representation, making some kind of inquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy, before any decision is made. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided, in coming to the decision the above well-recognised principles of judicial approach are required to be followed.<sup>26</sup>

4. The essential difference between an administrative and quasi-judicial act is that while in the former case, the authority vested with the power to give a decision affecting the rights of others, may be bound to enter upon an enquiry, he is *not bound to give a decision* as a result of the enquiry, but may act in his discretion in utter disregard of the result of the enquiry; in the latter case, the authority is bound by law to act on the facts and circumstances as determined upon the inquiry, in which a person to be affected is given full opportunity to place his case before the authority, even though the decision of such authority, whether right or wrong, may be final and may not be liable to be challenged in a court of law.<sup>27</sup>

21. *Radheshyam v. State of M. P.*, A. 1959 S.C. 107 (116); see also *Subba Rao J.* for the majority, in *Gullapalli v. A. P. State Road Transport Corpn.*, A. 1959 S.C. 308 (322).

22. *Nagendra v. Commr.*, A. 1958 S.C. 398 (408); (1958) S.C.R. 1240.

23. *Nageswara v. A. P. S. R. T. Corpn.*, A. 1959 S.C. 308 (321).

24. *Prov. of Bombay v. Khushaldas*, (1950) S.C.R. 621; (1950-1) C.C. 189 (192, 195, 205, 207); A. 1950 S.C. 222.

25. *Avadhesh v. State of U.P.*, A. 1952 All. 63.



5. When an executive authority has to form an *opinion* about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of an objective fact and the exercise of the power based thereon are alike matters of an administrative character and *certiorari* does not lie in such a case. Mere obligation to determine certain objective matters as a preliminary step does not make an executive function judicial, unless the law requires those facts to be determined *judicially*.<sup>1,2</sup>

#### Illustrations.

(i) The relevant provisions of the Bombay Land Requisition Ordinance, 1947 were as follows :

"3. *Requisition of land*.—If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose :

10. *Power to obtain information*.—(1) The Provincial Government may, with a view to carry out the purposes of this Ordinance, by order require any person to furnish to such authority as may be specified in the order such information in his possession relating to any land which is requisitioned or is continued under requisition or is intended to be requisitioned or continued under requisition."

*Held*, that an order of requisition in exercise of the foregoing powers was an administrative order. No doubt, before making the order of requisition under the Ordinance, the Provincial Government had first to decide whether there was a public purpose. But the inquiries prescribed by the Ordinance in order to ascertain whether there was a public purpose were only permissive and there was nothing in the Ordinance which required the Provincial Government to proceed in the judicial manner. The determination of the question as to the existence of a public purpose was, therefore, an administrative and not a quasi-judicial decision. Hence, there was no scope for the application of a writ of *certiorari*.<sup>3</sup>

(ii) In making a reference under s. 10 (1) of the Industrial Disputes Act, 1947, Government does an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an 'industrial dispute' within the meaning of the Act,<sup>4</sup> and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on these matters.<sup>5</sup>

1. *State of Madras v. Sarathy*, (1953) S.C.R. 334 (346).

2. *Rodheshyam v. State of M. P.*, A. 1959 S.C. 107 (128).

3. *Newspapers Ltd. v. Industrial Tribunal*, A. 1957 S.C. 532 (539).

4. In such a case the party aggrieved may ask for the writ of mandamus, prohibition or *certiorari* as may be appropriate in the circumstances [*Bengal Club v. State of W. B.*, A. 1956 Cal. 545 (550)].

5. *State of Madras v. Sarathy*, (1953) S.C.R. 334 : A. 1953, S.C. 53.

The power of the State to make a reference is to be determined not with reference to the date on which the reference was made but the date on which the right which is the subject matter of the dispute arose.<sup>6</sup>

6. A decision is administrative when it is left by the Legislature to the subjective satisfaction of the authority.<sup>7</sup> Though the same words may have a different meaning according to the context in which they are used and the terms of the statute in which they are used,<sup>8</sup> it may be mentioned, generally, that the following expressions have been held to indicate that the authority is empowered to determine the question on the subjective satisfaction—

(i) The words "If the Secretary of State has *reasonable cause to believe*", in an emergency Regulation, authorising the Secretary of State to intern persons "for securing public safety and the defence of the realm."<sup>9</sup>

(ii) The words "shall be *of opinion* that proceedings shall not be taken".<sup>10</sup>

(iii) The words "*reasonable grounds to believe*" in an Emergency Regulation, empowering the Textile Controller to cancel a textile licence.<sup>11</sup>

(iv) The words "*as it may judge most for the benefit of the property and the advantage of the minor*" in a Court of Wards Act, authorising the Court of Wards to enter into certain transactions with respect to the property of the ward.<sup>12</sup>

(v) The words "*is of opinion*", "*if it appears to*", in respect of a municipal authority empowered to take action in the interests of public safety.

(vi) The words "*considers . . . is likely to be secured*".<sup>13</sup>

(vii) The words "*after such summary inquiry, if any, as he thinks necessary*".<sup>14</sup>

7. A decision is administrative where in arriving at its decision the statutory body has only to consider policy and expediency and at no step has before it any form of *lis*.<sup>15</sup>

8. Where a proceeding is quasi-judicial, the mere fact that the decision of the authority is subject to *confirmation* and approval of another authority does not take away the quasi-judicial character of the decision.<sup>16</sup>

9. On the other hand, when a question is left to the subjective determination of an authority, the mere existence of a right of appeal against the order is not enough to indicate that the authority whose order is subject to appeal is under an obligation to act judicially.<sup>17</sup> On the other hand, where the decision of an authority is quasi-judicial, the act of an authority *confirming* that decision must necessarily be judicial.<sup>18</sup>

6. *Pipraich Sugar Mills v. Pipraich Sugar Mills*, A. 1957 S.C. 95.

7. *Nathubhai v. Municipal Corpn.*, (1958) 60 Bom. L.R. 515 (521).

7. *Nakkuda Ali v. Jayaratne*, (1951) A.C. 66 (76).

9. *Liversidge v. Anderson*, (1942) A.C. 206.

10. *Allcroft v. Bishop of London*, (1891) A.C. 666.

11. *K. D. Co. v. K. N. Singh*, A. 1956 S.C. 446 (452).

12. *Radheshyam v. State of M. P.*, A. 1959 S.C. 107 (127).

13. *Vrindar v. State of Punjab*, A. 1956 S.C. 153 (157) [s. 36 (2),

Representation of the People Act, 1951].

14. *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459.

15. *Hannumanbax v. S. D. O. Sibsagar*, A. 1952 Assam 115 (118).

16. *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278 (288).



(B) *As to quasi-judicial obligation arising out of a contest between two parties—*

1. In this class of cases, the quasi-judicial obligation need not be specifically laid down in the statute under which the authority is to decide the question. It will be implied<sup>17</sup> from the following circumstances<sup>18</sup>—

(a) That the dispute is between two parties relating to their respective rights;

(b) That the claim of the one party is opposed by the other<sup>19, 20</sup>;

(c) That there is nothing in the statute to indicate that the authority need not proceed judicially.

In *Express Newspapers v. Union of India*,<sup>21</sup> Bhagwati J. thus observed :

"If the functions performed by the Wage Board would thus consist of the determination of the issues as between a proposition and an opposition on data and materials gathered by the Board in answers to the questionnaire issued to all parties interested and the evidence led before it, there is no doubt that there would be imported in the proceedings of the Wage Board a duty to act judicially and the functions performed by the Wage Board would be quasi-judicial in character".<sup>22, 23</sup>

Once the quasi-judicial duty is implied, the Tribunal will have to comply with the rules of natural justice even though the statute itself does not prescribe any procedure.<sup>24, 25</sup>

**Whether the quasi-judicial duty can be implied from the nature of the function.**

1. Notwithstanding the decision in *Khusaldas's case*<sup>26</sup> [see p. 411, *ante*] the Courts have in some cases implied a duty to inquire or to afford an opportunity to be heard, according to the nature of the subject-matter, even though the statute was silent about it. Thus,

(a) An appellate function is *per se* quasi-judicial<sup>27</sup> and even where the appeal is from an administrative order, the appellate authority cannot act against the fundamental principles of natural justice,<sup>28</sup> even though he is not required by the statute to follow any particular procedure.<sup>29</sup>

(b) The same principle has been extended in the power of revision vested in a superior administrative authority.<sup>30, 31</sup>

2. In some cases, a distinction has been drawn between a common law right and a statutory right :

When the right to be affected is a *common law right* of a person, there is a presumption that an authority vested with the power to affect such right must act quasi-judicially. When the right to be affected is the *creation* of a *statute*, no such presumption arises, and the whole statute has been considered in order to determine whether the duty to act judicially is laid down in the statute itself.<sup>32</sup>

17. *Radheshyam v. State of M. P.*, A 1959 S.C. 107.

18. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621; (1950-51) C.C. 189 (207), Das J.

19. *Express Newspapers v. Union of India*, A. 1958 S.C. 578 (613), Bhagwati J.

20. *Gallapalli v. A. P. State Transport Board*, A. 1959 S.C. 308

21. *Shivji v. Union of India*, A. 1960 S.C. 606 (609).

22. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621; (1950-1) C.C. 189 (192, 195, 205, 207) : A 1950 S.C. 222.

23. *Nagendra v. Commr.*, A. 1958 S.C. 398 (406) : (1958) S.C.R. 1240.

24. *D. C. Mills v. Commr. of I. T.*, (1955) 1 S.C.R. 941.

25. *Avadhesh v. State of U. P.*, A. 1952 All. 63.

A quasi-judicial duty has thus been implied in the matter of exercising the following functions—

The cancellation or suspension of a licence which creates proprietary interest,<sup>1</sup> or the right to engage in a business.<sup>2</sup>

But no such obligation would be implied where the law seeks to meet an emergency<sup>3</sup> or safeguard the safety of individuals or of the public.<sup>4</sup>

3. The view that any authority having the legal power to decide a question relating to common law rights must be deemed to be quasi-judicial, has not, of course, been accepted by the Supreme Court.

But in *Radheshyam v. State of M. P.*,<sup>5</sup> Subba Rao J., in his minority judgment held that "the duty to act judicially may not be expressly conferred but may be *inferred* from the provisions of the statute. It may be gathered from the cumulative effect of the *nature of the rights* affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the *nature of the power conferred* or the duty imposed on the authority and other indicia afforded by the statute. In short, a duty to act judicially may arise in widely different circumstances and it is not possible or advisable to lay down a hard and fast rule or an inexorable rule of guidance."

Das C.J. and S. K. Das J. of the majority were also prepared to agree that the duty may arise by necessary implication from a statute, but they differed as to whether such implication could arise from the provisions in question in the particular case.

### Nature of the appellate function.

1. The appellate function, whether it is to be exercised by a judicial or administrative<sup>6</sup> authority, must be exercised quasi-judicially, even where the statute conferring such power is silent in this respect.

2. This means that the administrative authority must (i) hear in an objective manner, (ii) impartially, (iii) after giving reasonable opportunity to the parties to the dispute to place their respective cases before it, and (iv) pass 'speaking orders', that is, orders giving the reasons for the decision.<sup>7</sup>

3. As regards the obligation to give reasons, it follows that an administrative authority vested with appellate powers must give reasons, even though not so required by statute.<sup>8</sup> Hence, if a superior Court finds that the order of the appellate authority gives no reasons, it may send back the proceedings to that authority to give his reasons,<sup>9</sup> except where the appellate authority in his affidavit in the proceedings under Art. 226 gives reasons which are irrelevant to the statute and cannot, *prima facie*, justify the order.<sup>10</sup>

4. The principle has been extended to the function of statutory review, there being nothing in the statute to indicate that there is no duty to act quasi-judicially.<sup>11</sup>

1. *Ramnath v. Collector of Darbhanga*, A. 1955 Pat. 345; *Abdul Majid v. State of Madras*, (1957) Mad. 845 (852).

2. *Cf. Harishankar v. State of M. P.*, (1954) S.C.A. 824.

3. *Ajoy v. Corpn. of Calcutta*, A. 1956 Cal. 410.

4. *Radheshyam v. State of M. P.*, A. 1959 S.C. 107 (116, 119, 120, 134).

5. *Nagendra v. Commr.*, A. 1958 S.C. 398 (406).

6. *Glaxo Laboratories v. Venkateswaran*, A. 1959 Bom. 372 (380).

7. *Shivji v. Union of India*, A. 1960 S.C. 606 (609).



**(A) Authorities held to be quasi-judicial.**

The following have been held to be quasi-judicial tribunals against whose decisions *certiorari* or prohibition would lie—

(i) Administration of Evacuee Property Act, 1950,—the Custodian of Evacuee Property<sup>8</sup> acting under ss. 26 (1)-(2),<sup>9</sup> 27.<sup>10</sup>

(ii) Allahabad University Act,—the Chancellor acting under s. 42.<sup>11</sup>

(iii) Board of Revenue—hearing appeal.<sup>12</sup>

(iv) Assam Municipal Act, 1923,—an Appellate authority under a Municipal law,<sup>13</sup> the Town Committee hearing a petition of review under s. 89.<sup>14</sup>

(v) Bihar Mica Act, 1948,<sup>15</sup>—the State Government cancelling a licence under s. 25 (1)-(c).<sup>16</sup>

(vi) Cinematograph Act, 1918,—the Board of Censors.<sup>17</sup>

(vii) Court of Wards Act,—Government disqualifying a proprietor.<sup>18</sup>

(viii) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948,—the State Government exercising revisional power under s. 42.<sup>19</sup>

(ix) An Election Tribunal (see Art. 329 *post*).

(x) Industrial Disputes Act,—An Industrial Tribunal.<sup>20</sup>

(xi) Income Tax Act, 1922,—Income Tax Officer making assessment under s. 34.<sup>21</sup>

(xii) Land Acquisition Act, 1894,—the Land Acquisition Officer making a reference under s. 18 or s. 30.<sup>22</sup>

(xiii) Madras Village Panchayat Act,—Authorities disposing of objections to nominations.<sup>23</sup>

(xiv) Motor Vehicles Act, 1939,—Appellate Authority, deciding appeals;<sup>24</sup> State Government, disposing of applications for revision under s. 64A;<sup>25</sup> Regional Transport Authority, issuing permits.<sup>26</sup>

(xv) Municipal authority granting or refusing a licence for running a business.<sup>1</sup>

(xvi) Mineral Concession Rules, 1949,—The Central Government acting in revision under r. 54.<sup>2</sup>

(xvii) Payment of Wages Act,—The authority acting under s. 15.<sup>3</sup>

8. *Karam Singh v. Custodian*, A. 1951 Simla 171; *Ramtello v. Custodian*, A. 1957 M.B. 4; *Abdul Majid v. Nayak*, A. 1951 Bom. 440.

9. *Parduman Singh v. State of Punjab*, A. 1958 Punj. 63.

10. *Mahabir Motor Co. v. State of Bihar*, A. 1956 Pat. 437.

11. *Ishwari Prasad v. Registrar*, A. 1955 All. 131.

12. *National v. Board of Revenue*, (1952) 7 D.L.R. 25 (Raj). In re Shanmuga Mudaliar, (1950) 2 M.L.J. 399.

13. *Chunilal v. Palashmari Town Committee*, A. 1953 Assam 132.

14. *Cf. Ram Narain v. State of U.P.*, A. 1957 S.C. 18.

15. *Mineral Development Ltd. v. State of Bihar*, A. 1960 S.C. 458.

16. *Radha Films v. W. B. Board of Censors*, A. 1952 Cal. 653.

17. *Avadhesh v. U. P. State*, A. 1952 All. 63 (69).

18. *Fauja Singh v. Director*, A. 1958 Punj. 305 (307).

19. *Bharat Bank v. Employees of Bharat Bank*, A. 1950 S.C. 183; *Ranganathan v. M.E.T.*, A. 1952 Mad. 659.

20. *Suraj Mall v. Viswanatha*, A. 1954 S.C. 545.

21. *S. R. P. Das v. State of Orissa*, A. 1952 Orissa 98.

22. *Viseswara v. Dy. Panchayat Officer*, A. 1957 Andhra 539.

23. *Veerappa v. Raman*, A. 1952 S.C. 192; (1952) S.C.R. 533.

24. *Raman & Raman v. State of Madras*, A. 1959 S.C. 694 (698-9).

25. *P. T. Co-operative Society v. R. T. A.*, A. 1960 S.C. 801.

1. *Balaram v. Madras Corpn.*, A. 1952 Mad. 778.

2. *Shivji v. Union of India*, A. 1960 S.C. 606, reversing *Shivji v. Union of India*, A. 1959 Punj. 510.

3. *A. V. D'Costa v. Patel*, A. 1955 S.C. 412.

(xviii) Police Act, 1861,—Departmental proceeding against an officer under s. 7.<sup>4</sup>

(xix) Punjab Gram Panchayat Act,—A Panchayati Adalat,<sup>5</sup> A Gram Panchayat proceeding under ss. 21, 23.<sup>6</sup>

(xx) Punjab Tenancy Act (XVI of 1887),—Revenue Officer acting under s. 17.<sup>7</sup>

(xxi) Rent Control Acts,—The Appellate Authority<sup>8</sup> and the Rent Control Authority (in respect of certain decisions).<sup>9,10</sup>

(xxii) Representation of the People Act, 1951,—s. 36 (2).<sup>11</sup>

(xxiii) Sea Customs Act (VIII of 1878),—A Customs Authority ordering confiscation or adjudicating the penalty under ss. 167 (8),<sup>12</sup> 182-4.<sup>13</sup>

(xxiv) U. P. Zamindari Abolition and Land Reforms Rules, 1952,—The Collector acting under r. 115.<sup>14</sup>

(xxv) U. P. Municipalities Act,—Government removing a member under s. 40 (3).<sup>15</sup>

(xxvi) Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955,—The Wage Board performing its functions.<sup>16</sup>

(xxvii) In several decisions,<sup>17,18</sup> the Supreme Court has held that the function of issuing permits under s. 42 of the Motor Vehicles Act, 1939, is a quasi-judicial function.

But in the earlier case,<sup>19</sup> there was an observation that "no one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is *entirely within the discretion* of the transport authorities." This observation, it is submitted, requires to be modified inasmuch as if the matter lay entirely at the subjective discretion of the administrative authority, it would be an administrative and not a quasi-judicial function (which must be exercised objectively).

The later decisions<sup>17,18</sup> make it clear that the power must be exercised having regard to the conditions laid down in s. 47 of the Act, so that an order made without taking into consideration<sup>20,21</sup> the conditions specified in s. 47 or an order based on considerations entirely extraneous to those laid down in that section<sup>17</sup> would be liable to be quashed.

The discretion of the Transport Authority must, therefore, be exercised within the bounds of the statutory provision and, conversely, it is even competent for the Transport Authority to take into consideration administrative directions issued by the State Government under

4. *State of U. P. v. Nooh*, A. 1958 S.C. 86 (96).

5. *Shoukat v. The State*, A. 1954 Pat. 194; *Gopi v. Mt. Birni*, A. 1954 Pat. 195.

6. *Narain v. State*, A. 1958 Panj. 373 (P.B.).

7. *Tefa Singh v. Tehsildar*, A. 1952 Pepsu 102.

8. *Indra v. Ganguly*, (1950) 87 C.L.J. 130; *Krishnaswamy v. Mohanlal*, (1949) I.L.R. Mad. 657.

9. *Khurshed v. Rent Controller*, I.L.R. (1946) Bom. 940.

10. *Chandrabhan v. Rent Control and Eviction Officer*, A. 1954 All. 6.

11. *Virdindar v. State of Punjab*, A. 1956 S.C. 153 (157).

12. *Leo Roy v. Superintendent*, A. 1958 S.C. 119 (121).

13. *Sawpufanral v. Collector of Customs*, A. 1958 S.C. 845 (850).

14. *Babulal v. Hashmat*, A. 1958 All. 97.

15. *Mohammad Bux v. State of U.P.*, (1952) 7 D.L.R. 73 (All.).

16. *Express Newspapers v. Union of India*, A. 1958 S.C. 578.

17. *Raman & Raman v. State of Madras*, A. 1950 S.C. 694 (699).

18. *N. P. T. v. N. S. T.*, A. 1957 S.C. 232 (242).

19. *P. T. Co-operative Society v. R. T. A.*, A. 1960 S.C. 801 (806).

20. *Veerappa v. Raman*, A. 1952 S.C. 192; (1952) S.C.R. 583.

21. *Ramayya v. State of Madras*, A. 1952 Mad. 300.



s. 43A, provided such directions are not inconsistent with the conditions laid down in s. 47.<sup>17</sup>

(B) *Authorities held not to be quasi-judicial.*

On the other hand, it has been held that prohibition or *certiorari* does not lie against the decisions of the following authorities, on the ground that they are not quasi-judicial:

(i) Administration of Evacuee Property Act, 1950,—act of taking possession under.<sup>22</sup>

(ii) Bombay Land Requisition Act, 1948,—order of requisition under s. 5.<sup>23</sup>

(iii) C. P. & Berar Municipalities Act, 1922,—order under s. 53A.<sup>24</sup>

(iv) C. P. & Berar Revocation of Land Revenue Exemption Act, 1948,—resumption of political grants, under s. 3.<sup>25</sup>

(v) C. P. Code—Advocate-General giving consent under s. 92;<sup>1</sup> inquiry under s. 176.<sup>2</sup>

(vi) Employees' State Insurance Act, 1948,—demand of contribution under s. 73D.<sup>3</sup>

(vii) Income-tax Act, 1922,—Orders under s. 33A (1);<sup>4</sup> 33A (2);<sup>4</sup> 34(1A);<sup>5</sup> 40 (5A).<sup>6</sup>

(viii) Industrial Disputes Act, 1947—Order of reference under s. 10 (1);<sup>7</sup> Conciliation proceedings under s. 12 (1).<sup>8,9</sup>

(ix) Insurance Act,—action taken by Controller against insurer under s. 152A.<sup>10</sup>

(x) Minimum Wages Act,—fixation of minimum wages;<sup>11</sup> granting or withdrawal of exemption under s. 26(2).<sup>12</sup>

(xi) Motor Vehicles Act, 1939,—Order or direction of the State Government under s. 43A<sup>13</sup>; functions under ss. 68C-68D.<sup>14</sup>

(xii) Pensions Act, 1871,—grant of pension, under s. 5.<sup>15</sup>

(b) Sea Customs Act, 1878,—Order of assessment under s. 87.<sup>16</sup>

### Disciplinary proceedings against students.

Upon the question whether disciplinary proceedings taken by the heads of educational institutions under statutory powers against a

22. *Masumali v. Custodian of Evacuee Property*, (1951) 6 D.L.R. 45 (Sau.).

23. *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621; *Lilavati v. State of Bombay*, A. 1957 S.C. 521.

24. *Radheshyam v. State of M.P.*, A. 1959 S.C. 108 (119).

25. *Govindrao v. State of M.P.*, A. 1959 M.P. 339.

1. *Shanlanand v. Adv.-General*, A. 1955 All. 372 (376).

2. *Rajangam v. State of Madras*, A. 1959 Mad. 294.

3. *Anand v. E. S. Corpn.*, A. 1957 All. 136.

4. *Edara v. Commr. of I.T.*, A. 1959 A.P. 508.

5. *Bhowani Prasad v. I.T.O.*, A. 1960 All. 377.

6. *Calcutta Discount Co. v. I.T.O.*, A. 1952 Cal. 606.

7. *State of Mysore v. Sarathy* (1953) S.C.R. 334.

8. *Royal Calcutta Golf Club Union v. State of W.B.*, A. 1956 Cal.

550.

9. *Employees of Callex v. Commr. of Labour*, (1959) 2 M.L.J. 272.

10. *Jupiter General Ins. v. Rajagopalan*, A. 1952 Punj. 9.

11. *N. K. Jain v. Labour Commr.*, A. 1957 Raj. 35.

12. *Rambhau v. Talke*, A. 1959 Bom. 538.

13. *Raman & Raman v. State of Madras*, A. 1959 S.C. 695 (700).

14. *Krishnayya v. State of A.P.*, A. 1959 A.P. 292 (302).

15. *Suryanarayana v. State of Madras*, A. 1959 A.P., 487.

16. *Glaxo Laboratories v. Venkateswaran*, A. 1959 Bom. 372.

student, e.g., on the ground of misconduct, adoption of unfair means at examinations, there has been a sharp difference of opinion :

I. One view is that the function is *not* quasi-judicial and no question of an opportunity to be heard arises unless the statute or the regulations made thereunder require the authority to proceed quasi-judicially.<sup>17,21</sup>

But even though the function be administrative, the Courts may interfere if the statutory authority acts—

(a) capriciously<sup>17</sup>, or

(b) *mala fide*, i.e., from extraneous considerations.<sup>22</sup>

II. The other view is that even where the statute is silent as to the procedure, an implication to proceed after giving an opportunity should arise from the nature of the function, viz., that it is disciplinary action taken in exercise of statutory power.<sup>22,1</sup>

But a distinction has been made between cases where summary action is necessary, e.g., expulsion of a student from the examination-hall where he is detected of having taken unfair means, and cases where a student is sought to be expelled from the institution or disqualified for an examination on the ground of some suspicion as to misconduct which can be established only by investigation or due inquiry.<sup>22,2</sup> In the former case, if the delinquent student is interrogated on the spot and he is allowed to have his say before he is expelled, there has been a sufficient compliance with the requirements of natural justice and a formal proceeding to show cause is not necessary.<sup>2</sup>

It is submitted that so long as the dictum in *Prov. of Bombay v. Khussaldas*<sup>4</sup> stands, it is difficult to infer a duty to inquire or to give an opportunity to be heard in cases where the law itself does not require it. The question whether the duty to observe the rules of natural justice may arise from the nature of subject-matter of the proceeding itself is not yet authoritatively decided.

III. Disciplinary action by way of expulsion must, however, be distinguished from a refusal to admit or re-admit a student, which is solely within the discretion of the head of the institution.<sup>4,7</sup>

17. *Jagendra v. University of Allahabad*, A. 1956 All. 503 (506); *Ram v. Allahabad University*, A. 1956 All. 46 (50); *Son Pal v. University of Agra*, A. 1958 All. 792; *Calcutta Singh v. Registrar*, A. 1960 All. 529.

18. *Vazirani v. University, Baroda*, A. 1957 Bom. 246.

19. *Shibani v. Promotha*, A. 1952 Cal. 238.

20. *Uma Shankar v. State of Bihar*, A. 1959 Pat. 224.

21. *Sekkilar v. Krishnamoorthy*, A. 1952 Mad. 151.

22. *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278 : A. 1952 Cal. 594 [Question left open and mandamus issued, on appeal *University of Calcutta v. Dipa Pal*, (1952) C.W.N. 730 (S.B.)].

23. *Ramesh v. Padhy*, A. 1960 Orissa 196 (203).

24. *Sadhu Ram v. Principal*, A. 1954 Pepsu 151.

25. *Ghanshyam v. Board of High School*, A. 1956 All. 539.

1. In *B. C. Das Gupta v. Bejoyranjan*, (1952) 50 C.W.N. 861 : A. 1953 Cal. 212 the Court of Appeal applied the principles of natural justice against the State Medical Faculty even in a proceeding for mandamus.

2. *Dipa Pal v. University of Calcutta*, (1952) 56 C.W.N. 278 : A. 1952 Cal. 594 [Question left open and mandamus issued, on appeal, *University of Calcutta v. Dipa Pal*, (1952) 58 C.W.N. 730 (S.B.)].

3. *Shiva v. Allahabad University*, A. 1960 All. 198.

4. *Prov. of Bombay v. Khussaldas*, (1950) S.C.R. 621.

5. *Ramesh v. Principal*, A. 1953 All. 90.

6. *Sekkilar v. Krishnamoorthy*, A. 1952 Mad. 151.

7. *Ramesh v. Padhy*, A. 1959 Orissa 196 (203).



### Licensing.

#### A. Grant of licence.—

The granting and refusal of a licence is generally regarded as an administrative function, unless the statute specifically requires an inquiry or hearing.<sup>8</sup>

The mere fact that the authority is required to state his reasons in writing for refusal or there is a right of appeal to a superior administrative authority would not imply a quasi-judicial obligation for making the order of refusal.<sup>9,10</sup>

#### B. Cancellation or revocation.

1. There is a consensus of opinion<sup>11</sup> that when a licence is granted it confers a right of property, so that it cannot be subsequently cancelled or revoked without giving the licensee an opportunity to be heard,<sup>12</sup> even though it be an administrative order.<sup>13</sup>

2. On the other hand, it has been held that no such opportunity need be given

(i) where—the order granting the licence was *ultra vires* and was, accordingly, void;<sup>14</sup>

(ii) where the license does not relate to a trade or business as regards which a person has a common law or fundamental right to enter but the right has been created by statute<sup>15</sup> e.g., a mining lease under r. 82 of the Mineral Concession Rules, 1929;<sup>16</sup> a licence under the Arms Act, 1878.<sup>17</sup>

### Certiorari against decisions of administrative tribunals.

1. (i) *Certiorari* will be issued where the tribunal offends the principles of natural justice<sup>18</sup>, the requirements of which, of course, will have to be determined with reference to the provisions of the statute governing its constitution.<sup>19</sup>

(ii) Where the tribunal has no jurisdiction to entertain the proceeding, e.g.—

(a) Where an Industrial Tribunal entertained an application under s. 33A of the Industrial Disputes Act, 1947, in a case not coming under that section.<sup>20</sup>

b) Where the reference to the Tribunal itself was bad because the employees were not 'workmen' or the dispute referred to was not an 'industrial dispute'.<sup>21,22</sup>

8. *Moti v. Commr.*, A. 1960 M.P. 157 (159).

9. *Godha Singh v. Dt. Magistrate*, A. 1950 Punj. 33.

10. Observations to the contrary, in *Nakkuda Ali v. Jayaratne*, (1951) A.C. 66 must be confined to the emergency legislation before the Judicial Committee in that case. Secondly, in India, a licence to enter into a trade or business, in respect of which one has a fundamental right under Art. 19(1)(g), cannot be said to be a privilege'.

11. *Rameshwar v. Dt. Magistrate*, A. 1954 All. 144.

12. *Bajjnath v. State of Bihar*, A. 1950 Pat. 243 (245).

13. *Shivji v. Union of India*, A. 1959 Punj. 510 (514) assumed to be an 'administrative' function, on appeal, in *Shivji v. Union of India*, A. 1960 S.C. 606 (608).

14. *Kishore v. State of Rajasthan*, A. 1954 Raj. 264; *Kshirode v. Dt. Magistrate*, A. 1956 Cal. 96; *Moti v. Commr.*, A. 1960 M.P. 157.

15. *Dhakeswari Cotton Mills v. Commr. of I. T.*, A. 1955 S.C. 65 (69-70).

16. *N. P. T. Co. v. N. S. T. Co.*, (1957) S.C.R. 98 (118).

17. *S. K. G. Sugar v. Chairman, Industrial Tribunal*, (1958) S.C. [C.A. 793/57].

18-5. *Newspapers Ltd. v. State Industrial Tribunal*, (1957) S.C.R. 754 (769).

(iii) Where it has committed an error of law apparent on the face of the record.<sup>4</sup>

11. But the High Court will not interfere—

(a) Where there has been a mere breach of the technical rules of evidence and pleadings, not amounting to a violation of the rules of natural justice.<sup>5</sup>

(b) On a question of fact which the tribunal has jurisdiction to determine<sup>6</sup> unless it is shown to be fully unsupported by evidence.<sup>7</sup>

(c) In the exercise of its jurisdiction under Art. 226, the Court will not interfere with the exercise of a discretionary power by the inferior tribunal, unless it is arbitrarily exercised, e.g.—

The granting of adjournment of a proceeding.<sup>8</sup>

### Whether quasi-judicial body can review its decision.

Review being a creation of statute, a quasi-judicial body cannot review its own order. But it has an implied power to rectify its own mistakes,<sup>9</sup> which are apparent on the face of the record.<sup>10</sup>

### Certiorari against decisions of Election Tribunal.

1. Though the extraordinary powers of the High Court under Art. 226, cannot be fettered by the Legislature by making the orders of the Tribunal 'final', and though the powers of the High Court under this Article are purely discretionary, in the exercise of this discretion, the High Court should bear in mind—

(a) that the policy of the Legislature is to have disputes about these special rights decided as speedily as may be;

(b) that in the exercise of these discretionary powers, the High Court cannot assume to act as a court of appeal or revision to set aside findings of fact arrived at by the Tribunal or to set right mere errors of law which do not occasion injustice in a broad and general sense.<sup>11</sup>

Hence petitions under Art. 226 should not be lightly entertained in the class of cases.<sup>12</sup>

2. But the High Court can and should interfere under Art. 226—

(a) Where the Tribunal has acted without jurisdiction,<sup>13</sup> e.g.—

(i) Where an Election Tribunal allows an amendment of the election petition to cure the defect of non-joinder<sup>14,15</sup> or to withdraw or abandon any part of the claim.<sup>16</sup> The Election Commission has, under the law, no jurisdiction to grant any such adjournment.<sup>17</sup>

(b) Where it violates any principle of natural justice.<sup>18</sup>

(c) Where the Tribunal refuses to exercise a discretion given to it by law because of a misapprehension that it had none.<sup>19</sup>

### Certiorari in criminal cases.

Certiorari lies to quash a criminal proceeding—

(a) Where the Court had no jurisdiction.

6. *Nagendra v. Commr.*, (1958) S.C.R. 1240 (1269).
7. *D. C. Mills v. Commr. of I. T.*, A. 1955 S.C. 65.
8. *Associated Cement Co. v. Vyas*, A. 1960 S.C. 665 (668).
9. *Dharangadhra Chemical Works v. State of Saurashtra*, A. 1957 S.C. 264. (1957) S.C.R. 152.
10. *Gayadin Ram v. Khan*, (1951) 55 C.W.N. 667.
11. *Ram Nath v. S. T. Appellate Authority*, A. 1957 Pat 117.
12. *Shib Prasad v. State of W. B.*, (1958) 63 C.W.N. 88 (98).
13. *Sangram v. Election Tribunal*, (1955) 2 S.C.R. 1 (8).
14. *Basappa v. Ayyappa*, (1953) 1 M.L.J. 58 (S.C.).
15. *Kamaraja v. Kunju*, A. 1958 S.C. 687.



(b) Where the law under which the accused has been convicted is unconstitutional.<sup>16</sup>

### How far certiorari is a discretionary remedy.

1. *Certiorari* being a discretionary remedy,<sup>17,18</sup> a party may disentitle himself to this remedy by his conduct.

2. Conduct which disentitles the applicant to relief are, *inter alia*,—  
(a) Undue delay in bringing the application, which is not explained.<sup>19</sup> (See p. 352, *ante*).

(b) Suppression of material facts.<sup>20</sup> (See p. 353, *ante*).

(c) Omission to take the objection as to jurisdiction at the trial or original proceeding, unless it is shown that the Petitioner had then no knowledge of the facts constituting the defect of jurisdiction.<sup>21,22</sup>

3. It has also been refused in consideration of supervening circumstances.<sup>23</sup> Thus, where the R.T.A. cancelled the permits of the appellants in pursuance of a scheme for nationalisation, without giving 'due notice' as required by the statutory rules, the Supreme Court refused to interfere on the ground that after the order of the R.T.A., the appellants had withdrawn their vehicles from the routes and the vehicles of the State Transport Corporation had taken their place; that subsequent to the impugned order, the appellants had brought the matter before the Supreme Court in appeal from another application under art. 226 and lost on all the issues then raised. In these circumstances, the Supreme Court held that to give another opportunity to the appellants to make representations before the R.T.A. would be "only an idle formality".<sup>24</sup>

4. *Certiorari* to quash a decision will not be granted where the decision is wholly void and the inferior tribunal could not be ordered to resume the proceedings, e.g., where the proceedings have become null and void by the operation of a statute.<sup>25</sup>

5. But in the absence of such special circumstance *certiorari* is available almost as of right (*ex debito iustitiæ*) where there is a clear excess of jurisdiction and the applicant is the person aggrieved by the order complained of, as distinguished from a member of the public.<sup>2</sup>

### Whether right to certiorari may be lost by acquiescence.

On this question, a distinction has been made between cases where the defect in jurisdiction is *patent* and cases where it has to be established by evidence.

(A) Where the want of jurisdiction has to depend upon proof of certain facts, and if those facts are not raised and proved before the inferior tribunal and the party takes a chance of getting a decision in his favour then he cannot be permitted to raise a plea of want of jurisdiction in a proceeding for *certiorari*.

In this case, omission to take the objection as to jurisdiction at

16. *Ramji v. State of U. P.*, A. 1957 S.C. 620.

17. *Rashid v. I. T. I. Commn.*, (1952-4) 2 C.C. 434 (456) : (1954) S.C.R. 738.

18. *Allison v. Sen*, A. 1957 S.C. 227 (231) : (1957) S.C.R. 359 (370).

19. *Azizunnissa v. Asstt. Custodian*, A. 1957 All. 563 (574).

20. *M. U. M. Services v. R. T. Authority*, A. 1953 Mad. 59.

21. *Ambaram v. Guman Singh*, A. 1957 M.P. 58.

22. *G. M. T. Society v. State of Bombay*, A. 1954 Bom. 202.

23. *Rasant v. Janak*, A. 1954 All. 447; *Supdt. of Police v. Rem.*

A. 1959 All. 710.

24. *Nageswarao v. State of A. P.*, A. 1959 S.C. 1376.

25. *C. W. Motor Service v. State of Kerala*, A. 1959 Ker. 347 (350).

1. *Abdul Mazid v. State of Madras*, A. 1957 Mad. 551.

2. *Issardas v. Collector*, A. (1959) Mad. 328.

the trial or original proceeding is a ground for refusing relief under Art. 226 unless it is shown that the petitioner had then no knowledge of the facts constituting the defect of jurisdiction<sup>3,4</sup>. The principle is that the Petitioner having submitted to the jurisdiction of the inferior tribunal with full knowledge of facts constituting the want of jurisdiction, he should be estopped from raising that objection later, in an application under Art. 226 or 227.<sup>4</sup>

Grounds vitiating jurisdiction which come under this head are—bias,<sup>4</sup> unconstitutionality of the law upon which the jurisdiction of a tribunal which has the jurisdiction to decide a matter.<sup>4</sup>

(b) But where the lack of jurisdiction is patent on the face of the record<sup>4</sup> or the objection goes to the root of the jurisdiction<sup>5</sup> the consent or acquiescence of the party cannot give jurisdiction to the tribunal and the decision of the tribunal cannot stand.

Defects of this nature are defects in the constitution of the tribunal.<sup>3,13</sup>

#### How far certiorari may be barred by alternative remedy.

1. The rule of refusing relief on the ground of alternative remedy does not apply to *certiorari* to the same extent as it does in the case of *mandamus*.<sup>11</sup> The fact that the aggrieved party has another adequate remedy may be taken into consideration by the superior Court in arriving at the conclusion as to whether it should, in the exercise of its discretion, issue a writ of *certiorari* to quash the decisions of subordinate courts and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his statutory remedies, if any.<sup>12</sup> But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion, rather than a rule of law.<sup>11</sup>

2. But the existence of an alternative remedy is no ground for refusing *certiorari* where—

(a) it appears on the face of the proceedings<sup>11, 13, 14</sup> that the inferior tribunal has acted without jurisdiction or in excess of jurisdiction,<sup>15</sup> contrary to the fundamental principles of justice;<sup>11, 16</sup>

the application has been made by a party aggrieved and not merely by one of the public who is not personally concerned; and

the conduct of the applicant has not been such as to disentitle him to relief; or

(b) fundamental rights are affected.

3. *Ambaram v. Guman Singh*, A. 1957 M.P. 58.

4. *G.M.T. Society v. State of Bombay*, A. 1954 Bom. 202.

5. *Basant v. Janak*, A. 1954 All. 447.

6. *Sarjoo Prasad v. S.B.R.T.A.*, A. 1957 Pat. 732.

7. *Pannalal v. Union of India*, A. 1957 S.C. 397.

8. *National Coal Co. v. Dave*, A. 1956 Pat. 294 (297).

9. *United Commercial Bank v. Workmen*, A. 1951 S.C. 230.

10. *Badridass v. Appellate Tribunal*, A. 1960 Raj. 101.

11. *State of U. P. v. Nooh*, A. 1958 S.C. 86.

12. *Veerappa v. Raman*, A. 1952 S.C. 192; *Raman v. Raman*, A. 1956 S.C. 463.

13. *National Coal Co. v. Dave*, A. 1956 Pat. 294 (299).

14. *Ispahani v. Union of India*, A. 1957 Cal. 430.

15. *Sambandam v. General Manager*, (1952) 1 M.L.J. 540 (547); *Asstt. Collector v. Soortijmal*, (1952) 56 C.W.N. 452 (468, 470).

16. *Municipal Corpn. v. K. C. Sen*, A. 1952 Bom. 209 (231).

17. *Kochunni v. State of Madras*, A. 1959 S.C. 725 (see p. 193, ante). [The distinction made by Krishnan J. in *Ahmedali v. State of M.P.*, A. 1960 M.P. 282, between Arts. 32 and 226 does not appear to be sound].



In such cases, *certiorari* will lie even though a right of appeal has been conferred by statute<sup>18</sup>. Relief may be granted by *certiorari* in proper cases even where the Supreme Court has refused special leave to appeal under Art. 136; of course, the position would be otherwise where the Supreme Court has dismissed an appeal under Art. 136 on the merits.<sup>19</sup>

3. The existence of alternative remedy may thus be a ground for refusing *certiorari* only where the defect of jurisdiction is not patent on the face of the record,<sup>20</sup> and fundamental rights are not involved.<sup>21</sup>

But no such question arises where the alternative remedy is not speedy, effective and adequate.<sup>21</sup>

4. At any rate, relief under Art. 226, being discretionary, may be refused where the party has already brought the matter before High Court under another proceeding, e.g., a reference under s. 8 (5) of the Income-tax Investigation Commission Act, 1947;<sup>22, 23</sup> or where after obtaining a Rule in his application for *certiorari*, the applicant, without the knowledge of the Court, goes to pursue an alternative remedy (say, an administrative appeal) which is still pending at the time of the order in the proceeding for *certiorari*.<sup>24</sup>

#### How far *certiorari* can be barred by statute.

1. The remedies under Arts. 32 and 226 being constitutional remedies, cannot be barred by statute (see p. 350, *ante*). Thus, the Legislature cannot prevent the Court to determine, in a proceeding under these Articles, whether the provisions of a statute have been complied with.<sup>25</sup>

2. Even when the law confers 'final' power upon a quasi-judicial tribunal or authority to decide a matter, so that the decision of the tribunal cannot be challenged in a court of law, *certiorari* shall lie to quash the decision if (i) it is without jurisdiction; or (ii) if there is an error apparent on the face of the record, or (iii) there is any irregularity in the procedure adopted which goes contrary to the principles of natural justice.<sup>26</sup>

3. This does not mean, however, that the Legislature cannot confer upon the Executive or other authority the final power to determine certain facts. When the Legislature, in its wisdom, confers such final power upon an authority, the Courts cannot, in a proceeding for *certiorari* question the wisdom of the Legislature or reopen such a conclusive finding of fact.<sup>1</sup>

#### Who may apply for *certiorari*.

1. In *Chitranjit Lal's case*,<sup>2</sup> it was generally stated that except in the case of a proceeding for *habeas corpus*, none but the person whose rights have been affected can apply under Art. 32.

18. *Western India Match Co. v. Industrial Tribunal*, A. 1958 Mad. 398.

19. *Prashar v. Dwarkadas*, A. 1956 Bom. 530 (536).

20. *Cf. Rashid v. I. T. I. Commn.*, A. 1954 S.C. 207.

21. *Subramania v. Revenue Divisional Officer*, A. 1936 Mad. 454 (457).

22. *National Coal Co. v. Dave*, A. 1956 Pat. 294 (297).

23. *Ray & Co. v. I. T. O.*, A. 1959 Cal. 131 (140).

24. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (528).

25. *Parry & Co. v. Commercial Employees' Assn.*, (1952) S.C.R. 519.

1. *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (528).

2. *Chitranjit Lal v. Union of India*, (1952-54) 2 C.C. 10 (12).

2. In the case of *certiorari*, there has been some uncertainty as to whether a person who was not a party to the impugned proceeding could apply to quash the order complained of.

(A) A Calcutta decision<sup>3</sup> suggests that a person who was not a party to the proceeding cannot apply. Thus,

Where certain employees were dismissed by a Bank and the Petitioner was employed in the vacancy caused and the dispute between the Bank and the employees was subsequently referred to the Industrial Tribunal, it was held that the Petitioner had no *locus standi* to challenge the order passed by the Appellate Tribunal as without jurisdiction, as the Petitioner was no party to the dispute which was before the Tribunal.

(B) But the better view appears to have been expressed in a previous decision of the Calcutta High Court<sup>4</sup> and by the Assam<sup>5</sup> and Madras<sup>6</sup> High Courts that if the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy of *certiorari* as may such private citizen who suffers peculiar injury by reason of a judgment or order in excess of jurisdiction. In short, any member of the public, who has not disentitled himself by his conduct, may draw the attention of a superior Court to an order passed by a subordinate tribunal being manifestly illegal or *ultra vires*,<sup>7,8</sup> for it is the duty of the superior Court to quash such order.

On the same principle, an elector may apply for *certiorari* to quash an order of an Election Tribunal on the ground that it is without jurisdiction even though the unsuccessful candidate makes no complaint.<sup>9,7</sup>

3. But a distinction is made between a case where an application is made by a stranger and a case where the application is made by the party aggrieved.

(a) If the Court is moved by a member of the public having no personal or particular interest with regard to the subject-matter, the granting of the writ would be entirely within the discretion of the Court.<sup>8,9</sup>

(b) Where, however, the Court is moved by the party aggrieved by the inferior tribunal, the writ will be issued *ex debito iustitiae*, unless the party has disentitled himself to the relief by reason of his conduct.<sup>8</sup>

### Whether joint petition lies.

1. Apart from cases where a number of persons have a *common* or *joint* interest in the subject-matter of the controversy, persons having similar but wholly separate and distinct interest in the subject-matter, should file separate applications.<sup>8</sup>

2. Though the order of the inferior tribunal which is sought to be quashed be a consolidated order against several persons *similarly* situated, all such persons cannot join in a single petition for *certiorari*, except where their interest is joint.<sup>8,10</sup>

3. Where distinct orders have been made against several persons, they cannot bring a joint application merely because they seek to

3. *Sisir Kumar v. Majumdar*, A. 1955 Cal. 309.

4. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452 (469).

5. *Damodar v. Naranarayan*, A. 1955 Assam 164 (169). [Following *Ferris*, Extraordinary Remedies, Para. 174].

6. *Issardas v. Collector of Madras*, A. 1959 Mad. 528.

7. *Sasamusa Sugar Works v. State*, A. 1955 Pat. 49.

8. *Issardas v. Collector of Madras*, A. 1959 Mad. 528.

9. *Rainbow Dyeing Factory v. Industrial Tribunal*, A. 1959 Mad. 137.

10. *Gopalakrishna Rao, In re*, A. 1957 A.P. 88.



challenge the validity of the statute under which all the orders have been made.<sup>11</sup>

### Practice and Procedure.

When a superior Court issues a Rule on an application for *certiorari* it is incumbent on the inferior Court or tribunal, to whom the Rule is addressed, to produce the entire records before the Courts along with its return.<sup>12</sup>

### Scope of order.

1. The general rule is that

(a) In issuing the writ of *certiorari*, the Court does not sit as a Court of appeal over the judicial or quasi-judicial authority. The Court is only concerned with the question whether the Tribunal has or has not acted without jurisdiction or has contravened the principles of natural justice in the exercise of its jurisdiction. If it has done either, the jurisdiction and power of the Court issuing *certiorari* is simply to quash such order.<sup>13</sup>

(b) However wide the jurisdiction, the High Court cannot, under Art. 226 convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.<sup>14</sup> In granting a writ of *certiorari*, the superior Court demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views, for those of the inferior tribunal.<sup>15</sup>

### Illustration.

Where, in a dispute between two rival claimants for running through a particular route five buses, the Central Road Traffic Board restored the permanent permits which had been granted to one of the claimants, after calling for a report from the Regional Transport officer and after considering several circumstances which had a material bearing on the case, but the High Court quashed the orders of the Board by a writ of *certiorari* on the ground that the Board had proceeded upon an erroneous view of the law and also issued a writ of mandamus to the Board to transfer, issue or grant permanent permits to the Petitioner (i.e., the other claimant), held by the Supreme Court, that when the Board had granted permits to the respondent after considering all the material circumstances, the High Court could not, under Art. 226, quash that order, even though erroneous, and that in any event, the order of the High Court directing the Transport Authority to grant permit to the Petitioner was clearly in excess of its powers and jurisdiction.<sup>16</sup>

(c) It would be left to the Tribunal whether to hear the matter again or not.<sup>17</sup> It cannot be said that the inferior Tribunal ceases to have jurisdiction to proceed further according to law because the High Court has given no such direction.<sup>18</sup>

2. To the above rule, an exception has been engrafted by the majority of the Supreme Court in *Mahboob v. S.T.A.*,<sup>19</sup> in res-

11. *Ibrahim v. Dy. C. T. O.*, A. 1956 Mad. 628.

12. *Ghale Mal v. State of Delhi*, A. 1959 S.C. 65 (69).

13. *Veerappa v. Raman*, (1952) S.C.R. 583. A. 1952 S.C. 192.

14. *Basappa v. Nagappa*, A. 1954 S.C. 440 : (1955) 1 S.C.R. 250.

15. *Thakur v. Labour Appellate Tribunal*, A. 1957 Bom. 46.

16. *Mahaboob v. S.T.A.*, A. 1960 S.C. 321 (327).

[The observations to the contrary in *Usman v. Labour Appellate Tribunal*, A. 1952 Bom. 443, cited in (1952) 2 Sh. 367, must now be taken as superseded].

pect of cases where the discretion of the inferior tribunal is circumscribed by statutory provisions. In such a case, besides quashing the impugned order, the Court may issue a direction in the nature of *mandamus*, requiring the tribunal to comply with the requirements of the law.

### Whether the impugned order may be quashed partially.

1. The Supreme Court has held that the doctrine of severability which is applicable to a statute where its constitutionality is challenged [see p. 22, *ante*] may be extended to quasi-judicial orders.<sup>17,18</sup>

2. It has, therefore, to be determined in each case whether the order is 'severable'.

1. (a) Where only one or some of the persons affected by an order come to the Court and it is possible to keep in tact the order except so far as the Petitioner or Petitioners are concerned, the Court may not set aside the order *in toto*, but quash it only so far as the Petitioner or Petitioners have been prejudiced.<sup>19</sup>

(b) Where an administrative tribunal has a discretionary power to renew a permit but the power is circumscribed by the statutory condition that the renewal must not be less than a minimum specified period, which is not complied with by the impugned order, the Court may quash only that part of the order which specifies the period of renewal and direct the tribunal to amend the order so as to comply with the statutory requirement.<sup>20</sup>

(c) Where the Petitioner combines a prayer for *mandamus* along with *certiorari*, the Court may grant *mandamus* in respect of a portion of the impugned order, if it is severable, though *certiorari* to quash the order is refused.<sup>21</sup>

### Illustration.

The Collector of Customs had ordered for the lease of confiscated gold on payment of a fine and on the fulfilment of two conditions. He had no jurisdiction under the law to impose these two conditions. It was found that the two conditions were severable from the rest of the order. The Court, therefore, dismissed the application under Art. 226 so far as the prayer for quashing the order of confiscation and of the payment of fine, but allowed it in part by granting a direction 'restraining the respondent from enforcing the two invalid conditions.'<sup>22</sup>

II. If, however, it is not possible to sever the order, the Court must quash the order as a whole. Thus, the scheme of the Industrial Disputes Act being that a dispute should be finally settled by the Industrial Tribunal and its award should be binding on not only the actual parties before the Tribunal but also all workers in the establishment, present and future, the Court must quash the *ultra vires* order as a whole and not merely as regards the Petitioner or Petitioners applying for *certiorari*.<sup>23</sup>

17. *Mahaboob v. S.T.A.*, A. 1960 S.C. 321 (326). [Kapur J., dissenting].

18. *Sewpujanrai v. Collector of Customs*, A. 1958 S.C. 845 : (1959) S.C.R. 821.

19. *Abdul Majid v. Nayak*, A. 1951 Bom. 440.

20. *Mahaboob v. Mysore S.T.A.*, A. 1960 S.C. 321 (327).

21. *Sewpujanrai v. Collector of Customs*, A. 1958 S.C. 845 (857); (1959) S.C.R. 821.

22. *Usman v. Labour Appellate Tribunal*, A. 1952 Bom. 443.



### Appeal.

1. Appeal lies to the Supreme Court against an order in a proceeding for *certiorari* under Arts. 132-136, as may be applicable.<sup>22,24</sup>

2. Proceedings by way of *certiorari* are not 'of course'. Hence, the Supreme Court would not interfere with a dismissal of a petition for *certiorari* by the High Court unless the Supreme Court is satisfied that there has been a failure of justice.<sup>23</sup>

3. Thus, the Supreme Court has set aside an order granting *certiorari* on the ground, *inter alia*, that—

The High Court's decision that there had been a failure of natural justice in the proceeding before a quasi-judicial tribunal as erroneous.<sup>25</sup>

4. On the other hand, the Court has set aside the order of a High Court refusing *certiorari*—

Where the High Court dismissed *in limine* an application under Art. 226 for quashing an order of a Tribunal which was found by the Supreme Court to be without jurisdiction.<sup>26</sup>

### Effect of the order.

When an order of an inferior Tribunal is quashed by *certiorari*, that Tribunal is left at large to pass any proper order in accordance with the law and in the light of the decision of the High Court<sup>1</sup> [See p. 427, *ante*].

### Costs in a proceeding for Prohibition or Certiorari.

1. In the absence of Rules framed by the High Courts in this behalf, the English principles are being followed.

2. Usually, costs are awarded to the successful applicant,<sup>2</sup> and against the unsuccessful applicant.<sup>3</sup>

3. But the Court may not award costs against the unsuccessful applicant in special circumstances, e.g., uncertainty of law.<sup>4,5</sup> In some cases costs have not been awarded even to the successful applicant,<sup>6</sup> e.g., because the law was uncertain and the authority was not to blame.<sup>7</sup>

3. As to the party liable for this costs,—in the absence of any misconduct on the part of the Tribunal costs are awarded against the party who initiated the proceeding<sup>8</sup> and not against the Tribunal. But where such allegation is made and the Tribunal unsuccessfully contests, costs may be awarded against the Tribunal also.<sup>9</sup>

4. Costs may be awarded against the party responsible for the proceeding in which the offending order was made, even though the

23. *A. M. Allison v. Sen*, A. 1957 S.C. 227 (231).

24. Cf. *N. P. T. Co. v. N. S. T. Co.*, A. 1957 S.C. 232 (233).

25. *Punjab National Bank v. Sri Ram*, A. 1957 S.C. 276 (278).

1. *M. D. Thakur v. Labour Appellate Tribunal*, A. 1957 Bom. 46 (48).

2. *Ebrahim v. Regional Transport Authority*, I.L.R. (1950) Mad. 571; *Raghunath v. State T. A.*, A. 1951 Orissa 81 *Suresh v. Himangshu*, (1951) 55 C.W.N. 605.

3. *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96; *Beary v. Hassan*, (1951) 6 D.L.R. 96 (Mad.).

4. *Mohsinall v. State of Bombay*, A. 1951 Bom. 303.

5. *Makhan v. Chatterjee*, A. 1955 Cal. 72 [statute being recent, had not been authoritatively interpreted before].

6. *Shankarlal v. Addl. Dy. Commr.*, (1951) 6 D.L.R. 108 (Nag.).

7. *Calcutta Discount Co. v. I. T. O.*, A. 1952 Cal. 606 (610).

8. *Gangadhar v. I. T. Investigation Commu.*, A. 1955 All. 515 (518).

9. *Ahmedali v. Lalkaka*, A. 1954 Bom. 33.

Court is unable to issue a writ against it because it resides outside the Court's jurisdiction.<sup>10</sup>

## QUO WARRANTO

### Quo Warranto, nature of.

*Quo Warranto* is the remedy or proceeding whereby the State inquires into the legality of the claim which a party asserts to an office or franchise, to oust him from its enjoyment if the claim be not well founded, or to have the same declared forfeited, and recover it, if, having once been rightfully possessed and enjoyed, it has become forfeited for mis-user or non-user.

### Conditions for the issue of Quo Warranto.

A writ of *Quo Warranto* will issue in respect of an office only if the following conditions are satisfied :

I. The office must be *public* and of a *substantive* nature. It will not lie in respect of office of a private charitable institution or of a private association. Thus, the Managing Committee of a private school, even though a small section of the public, viz., the students and their guardians are interested in the school, is not an office of a public nature, for the purpose of *Quo Warranto*.<sup>11</sup>

II. It must have been created by *statute* or by the Constitution itself.<sup>12</sup> Thus,

(a) The writ will *not* lie against the Managing Committee, not created by any statute, or by Rules having statutory force of a private educational institution.<sup>13</sup>

(b) On the other hand, the writ would issue in respect of the offices of—

(i) Officers appointed under the Calcutta Municipal Act;<sup>14</sup>

(ii) Members of a local or municipal body, created by statute;<sup>15,16</sup>

(iii) Members of any statutory body, such as the Devaswom Board;<sup>17</sup>

(iv) Officers of a University created by statute;<sup>18</sup>

(v) Speaker of a House of the Legislature;<sup>19</sup>

(vi) Advocate-General;<sup>20</sup>

(vii) Member of a Legislature;<sup>21</sup>

(viii) Judge of a High Court;<sup>22</sup>

(ix) Vice-Chancellor of a University.<sup>23</sup>

III. The respondent must have asserted his claim to the office. Whether the respondent has usurped the office is a question of substance and *Quo Warranto* may issue even though the respondent has not assumed the name of the office.<sup>24</sup>

10. *Gangadhar v. I. T. I. Commn.*, A. 1955 All. 515.

11. *Amarendra v. Narendra*, A. 1953 Cal. 114.

12. *Ashgar Ally v. Birendra*, (1945) 49 C.W.N. 658.

13. *Haran v. State of W. B.*, A. 1952 Cal. 907.

14. *Masehulla v. Abdul*, A. 1953 All. 193.

15. *Shyabudinsab v. Municipality*, A. 1955 S.C. 314.

16. *Govinda v. Balakrishna*, A. 1955 T.C. 42.

17. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (62).

18. *Nesamony v. Varghese*, A. 1952 T.C. 66.

19. *Karkare v. Shevde*, A. 1952 Nag. 330.

20. *In re Chakkarai*, A. 1953 Mad. 96; *Despande v. State of Hyderabad*, A. 1955 Hyd. 396.

21. *Cf. Bhaskara v. State of T. C.*, (1950) 5 D.L.R. 382 (T.C.).

22. *Chaturvedi v. Chatterjee*, A. 1959 Raj. 260.

23. *In re Banwarilal*, (1944) 48 C.W.N. 766.



**When Quo Warranto may be refused.**

1. *Quo Warranto* is a discretionary remedy which the Court may grant or refuse according to the facts and circumstances of each case. Thus, the Court may refuse it—

- (a) Where it would be vexatious;
- (b) Where it would be futile in its results;
- (c) Where there is an alternative remedy equally efficacious;
- (d) Where there has been an *irregularity* in the election to an office which has not affected the result of the election and there is no bad faith;<sup>24</sup>
- (e) Where the result of granting a *Quo Warranto* in the matter of election to a corporate office would be to disturb the peace and quiet of the Corporation,<sup>25</sup> unless the illegalities brought to the notice of the Court are grave and manifest.<sup>1</sup>

*Illustration.*

Where it was found that a vast number of the residents of a municipality had been disenfranchised and that the defect as to the delimitation of constituencies had been brought to the notice of the election authorities before the election was held but the objection was ignored, *Quo Warranto* was issued, unseating the elected members, notwithstanding the inconvenience that might be caused by a fresh election.<sup>2</sup>

- (f) Where the motive of the relator (*i.e.*, applicant) is suspicious;<sup>32</sup>
- (g) Where the petitioner is guilty of laches;<sup>3</sup>
- (h) Where the applicant has acquiesced or concurred in the very act which he comes to complain of.<sup>3</sup> Thus,

(a) Where the Petitioner seeking to object to the validity of the election of the respondent was himself a candidate at the election and came to the Court only after he was defeated, he cannot be allowed to challenge the validity of the election.<sup>3,4</sup>

(b) But where the Petitioner stood as a candidate for the election but came to Court before the election was held, the writ cannot be refused on the ground of acquiescence.<sup>3</sup>

(i) A statutory remedy displaces a writ in the nature of *Quo Warranto* but not where the objection taken falls outside the scope of the statutory remedy.<sup>5</sup>

(j) Where there is a domestic jurisdiction, the Court may refuse to entertain a proceeding for *Quo Warranto* until the domestic remedy is exhausted.<sup>6</sup>

2. But considerations, such as the following, are no grounds for refusing *Quo Warranto*, once the Court is satisfied that the respondent is a usurper to the public office in question :

That the respondent has discharged the functions of the office for any length of time.<sup>8</sup>

24. *B. K. Sen v. Bhattacharya*, (1959) 59 C.W.N. 590 (610).

25. *Mohichandra v. Secy., Local Self-Govt.*, A. 1953 Assam 12.

1. *Surendra v. Gopal*, A. 1952 Orissa 359 (374).

2. *Sham Sunder v. State of Punjab*, A. 1958 Punj. 128 (132).

3. *Cama v. Banwarilal*, A. 1953 Nag. 81 (86).

4. *Raghuni v. Dist. Magistrate*, A. 1959 Pat. 7.

5. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (63).

6. *Sham Sunder v. State of Punjab*, A. 1958 Punj. 128 (132).

7. *Chaturvedi v. Chatterjee*, A. 1959 Raj. 260.

8. *Kashinath v. State of Bombay*, A. 1954 Bom. 41.

### **Quo Warranto, how far barred by alternative remedy.**

It has already been stated (p. 431, *ante*) that a statutory remedy,<sup>9</sup> e.g., an election petition<sup>10</sup> displaces the writ of *Quo Warranto*, except where the objection taken falls outside the statutory remedy,<sup>11</sup> e.g., a question as to the constitution of the Municipality itself.<sup>12</sup>

### **Who may apply for Quo Warranto.**

Where the application challenges the validity of an appointment to a public office, it is maintainable at the instance of any person, whether any fundamental or other legal right of such person has been infringed or not,<sup>13,14</sup> provided he is not a man of straw set up by someone else.<sup>14,15</sup> In other words, if the Court is of the view that in the interest of the public the legal position with respect to the alleged usurpation of a public office should be judicially declared, it can issue a writ of *quo warranto* at the instance of any member of the public who acts *bona fide* and is not a mere pawn in the game having been set up by others.<sup>12,16</sup>

Hence, a private relator,<sup>17</sup> such as an ordinary citizen,<sup>18</sup> can apply for *Quo Warranto* to challenge an appointment to a public office even though the applicant himself is not a candidate for that office nor has any other personal interest in such appointment.<sup>19</sup> Thus, not only a member but also a rate-payer can challenge the right of a person to sit as a member in a municipal body.<sup>20</sup>

### **Who are necessary parties.**

In the case of usurpation of a public office, the person who claims the exercise of the public office is the only proper defendant.<sup>21</sup> If others are joined, the misjoinder may not be fatal to the application, but no order can be passed on the application, unless the person who is sought to be ousted is made an Opposite Party by order of the Court. It is not enough that such person is acquainted with the facts of the case or has put in an affidavit in the proceeding other than as a party.<sup>22</sup>

If, however, the object of the application is to obtain a declaration that the approval given by a third party is invalid, the application is not maintainable without making such third party, a party to the application.<sup>23</sup>

### **Procedure.**

Rules of the Orissa, Mysore, Rajasthan, Patna and Assam High Courts require that the application should be made to a Division Bench.

9. *Sham Sunder v. State of Punj.*, A. 1958 Punj. 128 (132).

10. *Quaraball v. Govt. of Rajasthan*, A. 1960 Raj. 152 (158, 165).

12. *Bimanchandra v. Governor, W. B.*, (1952) 56 C.W.N. 651 (658); *Surendra v. Gopal*, A. 1952 Orissa 358 (373).

13. *Karkare v. Shevde*, A. 1952 Nag. 330.

14. *Deshpande v. Hyderabad State*, A. 1953 Hyd. 36 (38).

15. *Rajendrakumar v. State of M. P.*, A. 1957 M.P. 60 (62).

16. *Shivaramakrishnan v. Arumugha*, A. 1957 Mad. 17, overruling *Chakkarai*, in re, A. 1953 Mad. 96.

17. *Nesamony v. Varghese*, A. 1952 T.C. 66.

18. *Maschulla v. Abdul*, A. 1953 All. 193.

19. *Shivaramakrishnan v. Arumugha*, A. 1957 Mad. 17.

20. *Vishwanath v. State*, A. 1957 Raj. 75.

21. *Ferris*, Extraordinary Remedies, p. 148.

22. *Mohi Chandra v. Secy., Local Self-Govt.*, A. Assam 119.

23. *Amarendra v. Narendra*, (1952) 56 C.W.N. 449.



On the other hand, the Rules of the Trav.-Cochin, Madras, Nagpur, Allahabad, Andhra, Bombay High Courts prescribe that such application shall be heard by a Single Judge unless the Single Judge otherwise directs.

Under the Rules of the Calcutta High Court, such application is to be heard by a Single Judge as a Judge on the Appellate Side.

#### Form of order.

In a proceeding for *Quo Warranto* under Art. 226 of our Constitution, the High Court may make the following orders :

(i) The usual order would be an order of ouster of the respondent, —the person holding the office in question.<sup>24</sup>

(ii) It may issue an injunction restraining the respondent from discharging any of the functions, rights or duties of the office in question.<sup>24a</sup>

(iii) In proper cases, it may even declare the office to be vacant.<sup>24b</sup>

#### <sup>25</sup>227. (1) Every High Court shall have superintendence

Power of superin- over all courts and tribunals throughout tendence over all the territories in relation to which it courts by the High exercises jurisdiction.  
Court.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts ;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein :

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

#### Scope of the power under Art. 227.

1. It is now settled that the power of 'superintendence' conferred upon the High Court by Art. 227 is not confined to administrative superintendence only, but includes the power of *judicial revision*

24. *Karkare v. Shevde*, A. 1952 Nag. 330.

24a. Cf. *Kashinath v. State of Bombay*, (1953) 8 D.L.R. 226 (229) Bom.; *Maseh Ullah v. Abdul*, A. 1953 All. 193.

24b. *Lalit v. Viswanath*, A. 1952 Cal. 868.

25. Not applicable to Jammu & Kashmir.

also,<sup>1</sup> even where no appeal or revision lies to the High Court under the ordinary law.

2. This power involves a duty on the High Court to keep the inferior Courts and tribunals 'within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner'.<sup>1</sup>

3. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship<sup>2</sup> or *wrong* decisions.<sup>1, 3</sup> It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where *grave injustice* would be done unless the High Court interferes.<sup>3</sup> The power would not be exercised by the High Court to substitute its own judgment, whether on a question of a fact<sup>4</sup> or of law,<sup>5</sup> in place of that of the subordinate Courts.

### Arts. 226 & 227.

1. In exercise of the power of superintendence under Art. 227, the High Court cannot exercise its powers under Art. 226; nor is the exercise of the powers under Art. 227 controlled by anything in Art. 226<sup>6</sup>. The jurisdictions under the two Articles are separate and independent.

2. The power of judicial superintendence conferred by Art. 227 is not limited by the technical rules which govern the exercise of the power to issue writ of *certiorari* under Art. 226.<sup>7, 8</sup>

3. The power under Art. 226 can be exercised only on the application of a party and for the vindication of a legal right. But the power under Art. 227 may be exercised by the Court also *suo motu*.<sup>9</sup>

4. In a *certiorari* proceeding (under Art. 226), the High Court can only quash the decision of the inferior tribunal, but, under Art. 227, it can also issue further directions in the matter,<sup>9</sup> or pass a substantive order in place of the order which it has quashed.<sup>10, 11</sup>

5. In the same proceeding, therefore, the Court can quash an order under Art. 226 and also issue further directions which may not be available in a proceeding under Art. 226.<sup>12</sup>

Thus,

(a) In *Waryam v. Amarnath*,<sup>13</sup> the Supreme Court upheld an order under Art. 227 by which the Judicial Commissioner had not only quashed the orders of the District Judge and the Rent Controller but also allowed the application for ejectment brought by the respondent, giving the appellant three months' time to vacate the premises.

(b) In *Hari Vishnu v. Syed Ahmed*,<sup>14</sup> the Supreme Court granted *certiorari* quashing the decision of the Election Tribunal which had

1. *Waryam v. Amarnath*, (1954) S.C.R. 565; A. 1954 S.C. 215.

2. *Dalmia Airways v. Sukumar*, A. 1951 Cal. 193.

3. *Banerjee v. P. R. Mukherjee*, (1953) S.C.R. 302; (1952-4) 2 C.C. 489.

4. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264.

5. *Satyanarayana v. Mallikarjuna*, A. 1959 S.C. 137 (142).

6. *Ram Prasad v. State*, A. 1952 All. 842.

7. *Motilal v. State*, A. 1952 All. 963 (972).

8. *Hari Vishnu v. Ahmed*, (1955) 1 S.C.R. 1104.

9. *Aidal Singh v. Karan Singh*, A. 1957 All. 414 (432).

10. *M. D. Thakar v. Labour Appellate Tribunal*, A. 1957 Bom. 46 (48).

11. *Shivsingh v. Harjiram*, A. 1957 Raj. 39.

12. *Railhan v. State of U. P.*, A. 1956 All. 594.

13. *Waryam v. Amarnath*, (1952-54) 2 C.C. 490; (1954) S.C.R. 565.



rejected an election petition and, further, "in exercise of the powers conferred by Art. 227", set aside the election of the first respondent and also directed the Election Commission to hold a fresh election.

4. The scope of the two Articles being different, both Arts. 226 and 227 may be invoked in the same application<sup>14,15</sup> and the dismissal of an application under Art. 226 cannot operate as an absolute bar to an application under Art. 227.<sup>16</sup>

On the other hand,—

(a) While some High Courts had held<sup>17,18</sup> that the power under Art. 227 can be exercised in cases of obvious miscarriage of justice even where there is no question of a defect of jurisdiction, the Supreme Court<sup>19</sup> has laid down that while a writ of *Certiorari* can be issued under Art. 226 to quash an order on the ground of 'error (of law) apparent on the face of the record', the power of interference under Art. 227 is limited to seeing that the Tribunal functions within the limits of authority. In other words, under Art. 227, the High Court cannot interfere with a decision which is within the jurisdiction of the inferior tribunal on the ground that it is *erroneous* on a point of law, even though such error is apparent on the face of the record.

(b) Neither under Art. 226 nor under Art. 227 will the High Court interfere to correct an erroneous finding of fact on a matter which is within the jurisdiction of the inferior tribunal.<sup>20,21</sup>

#### The power under Art. 227 is discretionary.

1. The power under Art. 227 is exercised by the Court in its discretion and cannot be claimed as of right by any party.<sup>22</sup> Hence, though there is no period of limitation<sup>23</sup> prescribed for such application, it may be refused, *inter alia*, on the ground of unreasonable delay which is not explained by special circumstances<sup>24,25</sup> [see pp. 352-3, *ante*] and, particularly, where by reason of the delay the position of the opposite party has changed.<sup>26</sup>

2. A petition under Art. 227 on the ground of absence of jurisdiction of an inferior tribunal may also be refused if no objection as to jurisdiction was raised before the tribunal itself.<sup>1,2</sup>

14. *Hari Vishnu v. Syed Ahmad*, (1952-54) 2 C.C. 480 (488) : (1955) 1 S.C.R. 1104.

15. Cf. *Banerjee v. Mukherjee*, (1952-54) 2 C.C. 489 : (1953) S.C.R. 302.

16. *Venkatanarayana v. Ramaswami*, A. 1955 Andhra 40.

17. *Bawa Singh v. Kundan*, A. 1952 Punj. 422.

18. *Jagannath v. Puniya*, 1952 M.B. 51; *Khelawati v. Chait Ram*, A. 1952 Punj. 67.

19. *Nagendra v. Commr.*, A. 1958 S.C. 398 (413) : (1958) S.C.R. 1240 (1272).

20. *Kamath v. Election Tribunal*, A. 1958 M.P. 168 (174); *Malabar Products v. Industrial Tribunal*, A. 1958 Ker. 192 (194).

21. *Waryam v. Amarnath*, A. 1954 S.C. 215 : (1954) S.C.R. 565.

22. *Jodhey v. The State*, A. 1952 All. 788.

23. The view of the Judicial Commissioner of Himachal Pradesh [*Beg Ram v. Charan*, A. 1951 H.P. 16; *Sawan Ram v. Guman Singh*, A. 1959 H.P. 25] that the period of 90 days prescribed by the Limitation Act for applications for revision should apply to applications under Art. 227 is, it is submitted, without any foundation.

24. *Pulin v. Byomkesh*, A. 1953 Cal. 40.

25. *Jairam v. N. J. R. Mill*, (1958) 60 Bom. L.R. 539 (546).

1. *G. M. T. Society v. State of Bombay*, A. 1954 Bom. 202.

2. *Ambaram v. Guman Singh*, A. 1957 M.P. 58.

**If may be exercised suo motu.**

The power under Art. 227 may, in proper cases, be exercised *suo motu*.<sup>2</sup>

**How far existence of alternative relief would be ground for refusal to grant relief.**

1. Since the power under Art. 227 is an extraordinary power, to be used most sparingly,<sup>3</sup> the High Court would ordinarily refuse to exercise this power where some other adequate remedy is available to the applicant,<sup>4,7</sup> or where the applicant has already instituted a suit for precisely the same relief in respect of the impugned order.<sup>6</sup>

Thus, relief under Art. 227 has been refused on the ground that proper remedy lay—

- (i) Under O. 21, r. 90, C. P. Code.<sup>8</sup>
- (ii) By means of an election petition.<sup>9</sup>
- (iii) By moving the Appellate Tribunal constituted under the Police Act.<sup>7</sup>

2. But unless the alternative is as speedy and effective<sup>10</sup> as the remedy by way of application under Art. 227 (there could be very few remedies so speedy and effective), the mere existence of an alternative remedy cannot preclude the High Court from exercising its powers under Art. 227 to interfere with an order in flagrant violation of the law.<sup>11,12</sup>

3. Again, in the exercise of its power of superintendence, the High Court is bound to interfere, in cases of—

- (a) Absence or excess of jurisdiction;<sup>13</sup>
- (b) Infringement of a fundamental right.<sup>14</sup>

**Continued existence of the court or tribunal not a necessary condition.**

The power of superintendence of the High Court under Art. 227 is not taken away as soon as the inferior court or tribunal ceases to exist. If the other conditions are satisfied, *viz.*, that the order has resulted in grave miscarriage of justice in violation of the law, the High Court may interfere to set aside the order even though the court or tribunal is no longer functioning,<sup>15,16</sup> provided that the records of the tribunal are before the High Court.<sup>17</sup> Of course, positive direc-

3. *Barrow v. State of U. P.*, A. 1958 All. 154 (158).

4. *Waryam v. Amarnath*, (1954) S.C.R. 565; (1952-4) 2 C.C. 490.

5. *Haripada v. Ananta*, A. 1952 Cal. 528; *Machiraju v. Suryanarayana*, A. 1955 Andhra 192.

6. *Premuvali v. Satyamati*, A. 1953 All. 55.

7. *Ibrahim v. Chudasama*, A. 1956 Bom. 544 (548).

8. *Ajit v. Sarbamangala*, A. 1954 Pat. 476.

9. *Triloki Singh v. Returning Officer*, A. 1955 All. 536.

10. *Dharam v. Kakajan Tea Estate*, A. 1958 Assam 77 (79).

11. *Re Annamali Mudaliar*, A. 1953 Mad. 362.

12. *Abanindra v. A. K. Biswas*, A. 1954 Cal. 355 (361).

13. *Maidhan v. Medhi*, A. 1953 Assam 220.

14. *Ibrahim v. Chudasama*, A. 1956 Bom. 544 (547).

15. *Bhagtrathi v. State*, A. 1955 All. 113 (F.B.); *Municipal Commrs. v. P. R. Mukherjee*, (1950) 54 C.W.N. 784.

16. *Narayan v. Labour Appellate Tribunal*, A. 1957 Bom. 142.

17. *Kulkarni v. Bhimappa*, A. 1959 Mys. 108.



tions cannot be given by the High Court where the Tribunal has ceased to exist.

### Conditions for the exercise of the power under Art. 227.

1. The following conditions must be present in order that the power under Art. 227 may be exercised—

(a) That the impugned order or decision is without jurisdiction;<sup>18,20</sup> or against the principles of natural justice;<sup>21,22</sup> or involve non-exercise<sup>22,23</sup> or illegal exercise of jurisdiction;<sup>24</sup> or a grave dereliction of duty or flagrant violation of the law<sup>25</sup> as distinguished from a merely erroneous decision,<sup>21</sup> or irregularity in procedure.<sup>1</sup>

(b) That the exercise of the jurisdiction under Art. 227 does not amount to exercising the power of appeal or revision on questions of fact or of law.<sup>1-4</sup>

2. The power under Art. 227 will not be exercised in cases like the following :

(i) To allow a simple objection as to local jurisdiction in respect of a suit, which is liable to be corrected by the Court of appeal under s. 21 of the C. P. Code.<sup>2</sup>

(ii) Where the only question involved is one of interpretation of deed.<sup>6</sup>

(iii) On questions of admission or rejection of a particular piece of evidence, even though the question may be of every day recurrence.<sup>7</sup>

(iv) To correct an *erroneous* exercise of jurisdiction, as a Court of revision.<sup>8,9</sup>

(v) To set aside a finding of fact.<sup>10,11</sup>

3. As to whether the Court can interfere under Art. 227 on the ground of an error of law apparent on the face of the record, as in a proceeding for *certiorari*, there is a suggestion in *Satyannarayan v. Mallikarjun*<sup>12</sup> that the Court would have interfered if the error was 'apparent', but in the earlier case of *Nagendra v. Commr.*,<sup>3</sup> it was laid down that the power under Art. 227 cannot be used to correct an error of law, not affecting jurisdiction, even though it is apparent.<sup>13</sup>

18. *P. C. Guha v. Basil*, (1951) 55 C.W.N. 611 (617).

19. *Ratilal v. Chunnilal*, A. 1951 San. 15.

20. *Brij Narayan v. Ram Dayal*, A. 1954 All. 8.

21. *Waryam v. Amarnath*, (1954) S.C.R. 565.

22. *Satyannarayan v. Mallikarjun*, A. 1959 S.C. 137 (142).

23. *Jug Lal v. Karan Singh*, A. 1954 Pepsu 173; *Zaffar v. Mahabir*,

A. 1957 Pat. 286.

24. *Aswini v. Dominton of India*, A. 1952 Cal. 251.

25. *D. N. Banerjee v. P. R. Mukherjee*, A. 1954 S.C. 58 (59) :

(1953) S.C.R. 302.

1. *Dalmia Airways v. Sukumar*, A. 1951 Cal. 193 (S.B.).

2. *Jivana Mal v. Khushi Ram*, A. 1953 Punj. 70.

3. *State of U. P. v. Aziz*, A. 1955 All.

4. *Nakshad v. Jirekhan*, A. 1955 Pat. 118.

5. *Har Saran v. Mukundilal*, A. 1951 All. 514.

6. *N. G. C. Mills v. L. A. Tribunal*, A. 1957 Bom. 111 (115).

7. *Basant v. Arfundas*, A. 1952 V.P. 4.

8. *Dinaram v. Kakajan Tea Estate*, A. 1958 Assam 77.

9. *Waryam v. Amarnath*, (1954) S.C.R. 565.

10. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 : (1957) S.C.R. 152.

11. *Hargobind v. Rambaran*, A. 1954 Pat. 334.

12. *Satyannarayan v. Mallikarjun*, A. 1959 S.C. 137 (142).

13. *Nagendra v. Commr.*, A. 1958 S.C. 398 (413).

### In Civil Proceedings.

The power under Art. 227 is wider than that under s. 115 of the C. P. Code and may be used even where<sup>14,15</sup> s. 115 was not applicable.

Thus, the High Court has interfered with *judicial* orders, under Art. 227 :

(i) Where a District Judge, acting under s. 31 of the Provincial Insolvency Act, has wrongly refused protection order as a result of which the insolvent would be, imprisoned without any justification.<sup>14</sup>

(ii) Where a Subordinate Judge has signally failed in his duty by arbitrarily dismissing a suit for default although no default had in fact taken place and no neglect on the part of the Petitioner, no other effective alternative remedy being open to the Petitioner.<sup>15</sup>

(iii) Where a Judge of the Small Causes Court heard an appeal under the Rent Control Act, not being empowered in that behalf.<sup>16</sup>

### In Criminal Proceedings.

1. Since the power under Art. 227 includes judicial superintendence, it would follow that the High Court can exercise its revisional powers in a proceeding under this Article, e.g., to set aside a conviction which is not supported by any evidence at all.<sup>17</sup>

2. But the powers of the High Court under Art. 227 are not circumscribed by the conditions laid down in s. 439 of the Cr. P. C.<sup>18</sup>

Thus,

The High Court has exercised its power under Art. 227—

(i) To *stay* a criminal proceeding pending decision of civil suit relating to the same subject matter.<sup>19</sup>

(ii) To quash an order for the taking of photographic copies of account books recovered in pursuance of a search warrant, which was not warranted by s. 561A of the Cr. P. C. and was clearly without jurisdiction.<sup>20</sup>

### In Proceedings before Tribunals.

1. In exercise of its power under Art. 227 the High Court cannot interfere with a finding of fact recorded by a Tribunal,<sup>21</sup> e.g.,

Whether the relation between the parties is one of employer and employee.<sup>21</sup>

2. The Court can interfere with a finding of fact or of law of a Tribunal only if it affects its jurisdiction.<sup>22</sup>

### 'All courts'.

1. These words refer to courts subordinate to the High Court and do not include a Single Judge of the High Court.<sup>23</sup>

Art. 227 was not intended to authorise the High Court to revise

14. *Aswini v. Dominion of India*, A. 1952 Cal. 251.

15. *Ram Roop v. Bishwanath*, A. 1958 All. 457 (464).

16. *Nathal v. Nathal*, A. 1953 T.C. 41.

17. *Kantilal v. Azkul*, A. 1957 Cal. 546.

18. *Baldeo Singh v. State of Bihar*, A. 1957 S.C. 612 (614) : (1957) S.C.R. 995.

19. *Dharmeswar v. State*, A. 1952 Assam 78.

20. *Geeverghese v. Chacko*, A. 1957 T.C. 256.

21. *D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (268) : (1957) S.C.R. 152.

22. *Nagendra v. Commr.*, A. 1958 S.C. 398.

23. *In re Rangaswami*, A. 1957 Mad. 562.



its own decision,<sup>24</sup> or that of its officer exercising the powers of the High Court.<sup>24</sup>

2. It is not necessary for the exercise of this jurisdiction that the inferior Court or Tribunal should be subject to the appellate jurisdiction of the High Court<sup>1</sup> or that the order complained of should be appealable.<sup>25</sup>

### 'Tribunal'.

1. Since the word 'tribunal' is used both in Arts. 136 and 226, it should have the same meaning under both Articles. Hence, tribunals vested with purely administrative or executive functions would not come under Art. 227 (see p. 298, *ante*).

2. The following authorities have been held to be 'tribunals' within the meaning of Art. 227—

(i) Labour tribunals.<sup>1</sup>

(ii) The Commissioner of a Division or the Provincial Transport Authority<sup>2</sup>, acting as an Appellate Authority under the Motor Vehicles Act.<sup>3</sup>

(iii) An Appellate Tribunal under the W. B. Premises Rent Control Act,<sup>4</sup> including the Chief Judge of the S. C. Court.<sup>5</sup>

(iv) The Bhagchasi Conciliation Board as well as the Appellate Officer under the West Bengal Bargadars Act (II of 1950).<sup>6</sup>

(v) A Panchayati Adalat set up under the U. P. Panchayati Raj Act;<sup>7</sup> a Magistrate, acting under s. 52 of the Act; the Panchayat under the Patiala Panchayat Act;<sup>8</sup> a Gram Kutchery under the Bihar Panchayat Raj Act.<sup>9</sup>

(vi) A District Magistrate acting under s. 22 of the Bombay District Municipal Act,<sup>10</sup> or under s. 160 of the U. P. Municipalities Act.<sup>11</sup>

(vii) A Collector, acting under s. 18 (1) of the Land Acquisition Act.<sup>12</sup>

(viii) The Tribunal constituted under the Nagpur Improvement Trust Act.<sup>13</sup>

(ix) Authorities under a Rent Control Act.<sup>14,15</sup>

(x) A Deputy Commissioner, acting under s. 6 of the U. P. Land Utilization Act, 1948.<sup>16</sup>

24. *Santosh v. Registrar*, (1957) 63 C.W.N. 339 : A 1959 Cal. 317.

25. *Israil v. State*, A. 1951 Assam 106.

1. *Municipal Commrs. v. P. R. Mukherjee*, (1950) 54 C.W.N. 784. (792) ; *Union of Workmen v. R. S. N. Co.*, A. 1951 Assam 96.

2. *Raghunath v. State Transport Authority*, A. 1951 Orissa 81.

3. *S. M. Service v. Asansol Bus Association*, (1950) 55 C.W.N. 81.

4. *P. C. Guha v. Basil*, (1951) 55 C.W.N. 611 (617).

5. *Vurjee v. R. H. Singh*, A. 1952 Cal. 290.

6. *Madhai v. Prankrishna*, A. 1951 Cal. 139; *Haripada v. Ananta*, A. 1952 Cal. 526; *Narendra v. Binode*, (1951) 56 C.W.N. 23.

7. *Abdul Aziz v. State*, A. 1950 All. 611.

8. *Harnam v. Gurnam*, A. 1952 Pepsu 130.

9. *Baldeo Singh v. State of Bihar*, A. 1957 S.C. 612 : (1957) S.C.R. 995.

10. *Ratilal v. Chumtilal*, A. 1951 Sau. 15.

11. *Municipal Board v. Dt. Judge*, (1952) 7 D.L.R. 177 (All.).

12. *Radha Prasanna v. Prov. of Orissa*, A. 1952 Orissa 98; *Bimala v. State of West Bengal*, A. 1951 Cal. 258.

13. *Shridhar v. Collector*, A. 1951 Nag. 90.

14. *Makhnoba v. Rameshwar*, A. 1957 M.B. 11.

15. *Zaffar v. Mahabir*, A. 1957 Pat. 206.

16. *Shilab v. Suraj*, A. 1952 All. 750.

(xi) The Custodian, acting under s. 45 of the Administration of Evacuee Property Act, 1950.<sup>17</sup>

(xii) The Naya Panchayet Adalat under the C. P. & Berar Panchayet Act, 1947.<sup>18</sup>

(xiii) A District Judge acting as an Election Tribunal under the Orissa Municipal Act.<sup>19</sup>

(xiv) The Tribunal constituted under the Abducted Persons Recovery Act.<sup>20</sup>

(xv) The Bombay Revenue Tribunal under s. 76 of the Bombay Tenancy and Agricultural Lands Act, 1948.<sup>21</sup>

(xvi) The Rent Controller and the District Judge exercising appellate powers under the East Punjab Rent Restriction Act.<sup>22</sup>

(xvii) An arbitrator under the Co-operative Societies Act.<sup>23</sup>

(xviii) A Certificate Officer under the Bengal Public Demand Recovery Act.<sup>24</sup>

(xix) Tribunal set up under s. 249 of the Merchant Shipping Act, 1923.<sup>25</sup>

(xx) Tribunal under the Madras Estates Abolition Act.<sup>2</sup>

(xxi) Election Tribunal.<sup>3</sup>

(xxii) The Commissioner, acting under s. 44 (1) of the Orissa Hindu Religious Endowments Act, 1952.<sup>4</sup>

3. On the other hand, it has been held that the following authorities are not 'tribunals' within the scope of Art. 227—

(i) The Disciplinary Proceedings Tribunal in Madras, holding enquiry on charges against Government servants and recommending disciplinary action.<sup>5</sup>

(ii) Authority invested with jurisdiction under the Payment of Wages Act, 1936.<sup>6</sup>

(iii) The Revenue Divisional Officer, acting under s. 13 of Madras Act II of 1894.<sup>7</sup>

(iv) The Registrar of the High Court, acting as a Taxing Officer.<sup>8</sup>

**Cl. (4): Exclusion of Military Tribunals.**—This clause embodies the common law principle that a Civil Court has no power to interfere with decisions of military tribunals in respect of matters placed within their jurisdiction by the law.<sup>9</sup>

#### Power to transfer proceedings.

1. Since Art. 227 confers powers of judicial control, the High Court

17. *Karlar Singh v. Custodian*, A. 1952 Pepsu 82.

18. *Shrikrishna v. Dattu*, (1952) 7 D.L.R. Nag. 180.

19. *Jadumani v. Jadumani*, A. 1952 Orissa 244.

20. *State of Punjab v. Afalib*, A. 1953 S.C. 10 : (1953) S.C.R. 254.

21. *Nagayya v. Chayappa*, A. 1956 Bom. 500.

22. *Waryam v. Amarnath*, (1952-4) 2 C.C. 490 : (1954) S.C.R. 565.

23. *Khela Wali v. Chet Ram*, A. 1952 Punj 67.

24. *Abanindra v. Biswas*, A. 1954 Cal. 355.

25. *Pandhyan Ins. Co. v. Khambatta*, A. 1955 Bom. 241.

1. *Tirupathirayudu v. Venkalacharyulu*, A. 1955 Andhra 240.

2. *Harl Vishnu v. Ahmad*, A. 1955 S.C. 233 : (1955) 1 S.C.R. 1104.

3. *Ramakrishna v. Ramesh*, A. 1959 Orissa 98.

4. *Krishnamoorthy v. State of Madras*, A. 1951 Mad. 882.

5. *Mathur v. E. I. Oy.*, A. 1952 All. 80 (F.B.) [contra *Rajkumar v. Inspector*, A. 1950 M.B. 60].

6. *Machiraju v. Suryanarayana*, A. 1955 Andhra 192.

7. *Santosh v. Registrar*, (1957) 63 C.W.N. 339.

8. *Vishnukrishnan v. Kripal*, A. 1952 T.C. 7.



is empowered by this Article to transfer cases from a Court or tribunal to another.<sup>9</sup>

2. A Single Judge of the Andhra High Court<sup>10</sup> has, however, held that the power to transfer any proceeding to the High Court itself is contained in Art. 228 exclusively and that since tribunals are not mentioned in art. 228, the High Court has no power to transfer itself, under Art. 227 any proceedings pending before any statutory tribunal.

### Forum.

According to the Rules framed by the Bombay<sup>11</sup> and Patna High Courts, an application under Art. 227 is to be heard by a Division Bench.

On the other hand, under the Rules made by the Allahabad,<sup>12</sup> Calcutta, Madras, Nagpur High Courts, it is cognizable by a Single Judge.

### The jurisdiction under Art. 227 cannot be taken away by legislation.

The powers of the High Court under Art. 227 cannot be taken away or barred by any legislation short of constitutional amendment.<sup>13</sup> Nor can it be barred by providing that the decision of an inferior tribunal shall be final.<sup>14,15</sup>

### Appeal.

1. The Madras,<sup>16</sup> Allahabad<sup>17</sup> and Calcutta<sup>18</sup> High Courts have held that the jurisdiction vested in the High Court under Art. 227 is a revisional jurisdiction and, accordingly, no Letters Patent Appeal is competent from an order passed by a Single Judge in exercise of such jurisdiction.

2. Appeal lies to the Supreme Court under Arts. 132, 133 (1) (c)<sup>19</sup> 136.<sup>20</sup>

3. In an appeal from such order, it is open to the Supreme Court to exercise the same power under Art. 227 as the High Court could have exercised.<sup>21</sup> But it would not interfere with a finding of fact arrived at by a quasi-judicial Tribunal Against whose order the petition under Art. 227 has been brought.<sup>22</sup>

<sup>20a</sup> **228.** If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination

Transfer of certain cases to High Court.

of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself, or

9. *Abdul Rauf v. State of Hyderabad*, A. 1951 Hyd. 50 (F.B.).

10. *Ramalingam v. Gummurthy*, A. 1955 Andhra 85.

11. *Cf. Jal Hirji v. Hamid*, A. 1956 Bom. 323 (325).

12. *Ram Prasad v. State*, A. 1952 All. 843.

13. *Haripada v. Ananta*, A. 1952 Cal. 526 (529); *Ram Dubey v. Govt. of M. B.*, A. 1952 M.B. 57 (69); *Narendra v. Benode*, (1951) 56 C.W.N. 23.

14. *Jodhey v. The State*, A. 1952 All. 788; *In re Annamalai*, A. 1953 Mad. 362.

15. *Israil v. State*, A. 1951 Assam 106.

16. *In re Tirupulswamy*, A. 1955 Mad. 287.

17. *Aidal Singh v. Koran Singh*, A. 1957 All. 414 (431) F.B.

18. *Sukhendu v. Harekrishna*, A. 1953 Cal. 636.

19. *Cf. Baldeo Singh v. State of Bihar*, A. 1957 S.C. 612.

20. *Cf. D. C. Works v. State of Saurashtra*, A. 1957 S.C. 264 (267).

20a. Not applicable to Jammu & Kashmir.

- (b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

**Object of Art. 228: Transfer of constitutional cases from subordinate Courts to the High Court.**

The object of this Article is to make the High Court the sole interpreter of the Constitution in a state and to deny to the subordinate Courts a right to interpret the Constitution, for the sake of attaining some degree of uniformity as regards constitutional decisions. Under the present Article.—

(a) It is the duty of the High Court to withdraw from a subordinate Court a case which involves a substantial question of law as to the interpretation of the Constitution.

(b) It is also the duty of the subordinate Court to refer the case to the High Court as soon as it discovers that it involves such a question.

Under this Article, the High Court may be moved either by the parties or by the subordinate Court.<sup>21</sup>

**Conditions necessary for application of the Article.**

1. But though the High Court is made the sole interpreter of the Constitution, the Article does not intend to make the High Court a forum for *academic* discussions on constitutional questions.<sup>22</sup>

2. The following conditions must exist in order that High Court may exercise its power of withdrawal under the present Art.—

(i) A suit or case must be *actually* pending in a Court subordinate to the High Court. No one can move the High Court under Art. 228 stating that such a suit or case is intended to be filed. Nor will Art. 228 apply where the case has been already disposed of. On the other hand, the High Court can interfere where the suite or case is still pending,—whatever be the reason for its pendency, whether mischievous or selfish petitions by the plaintiffs or *bona fide* petitions filed for the ends of justice.<sup>23</sup>

(a) If, along with the constitutional question, there are *other* questions independent of the constitutional question (*e.g.*, limitation, formal defect) which are sufficient in themselves to dispose of the case, Art. 228 will not apply.<sup>24</sup> The High Court may decline to withdraw a case, until the *other* questions are determined by the Court below when it appears that the question whether the constitutional point is necessary for disposal of the case cannot be determined unless the other questions are decided.<sup>25</sup> Thus,

Where a person has been prosecuted for a statutory offence, no question of constitutional validity of the statute arises until the question whether he has violated the statute is determined.<sup>26</sup>

(b) But where it is clear that the suit cannot be disposed without a determination of the constitutional question, the High Court is bound

21. *Rulla Ram v. Sadh Ram*, A. 1952 Pepsu 1.

22. *Faqir Chand v. Bhagwati*, A. 1958 Panj. 287.

23. *Ramaswami v. Madras H. R. E. Board*, A. 1952 Mad. 20.

24. *Narkari v. State*, A. 1955 Pat. 177.

25. *State of Bihar v. Hamid*, A. 1954 Pat. 387.



to withdraw the suit at once.<sup>1,2</sup> In such cases, the object of Art. 228 would be frustrated if the transfer to the High Court is postponed until the other issues are decided.<sup>3</sup>

(ii) The High Court must be satisfied that the case involves a substantial question of law as to the interpretation of the Constitution. A mere frivolous allegation that such a question is involved will not do.<sup>4</sup>

(iii) The High Court must be satisfied that the determination of the constitutional question is necessary for the disposal of the case. Usually the High Court will not act until this point is clear, but where it is clear, it will act at once.<sup>5</sup>

#### Illustration.

The respondent, a scheduled Bank, sued for recovery of money. The Appellant contested the suit on the ground that he was entitled relief under the Uttar Pradesh Debt Reduction Act, 1953. The definition of 'debt' in this Act, however, excluded a debt due to a scheduled bank. The Appellant challenged the validity of this definition as contravening Art. 14 and applied to the High Court under Art. 228 for withdrawal of the suit for determination of this question. The High Court dismissed the application on the ground that there was no constitutional question involved but a question of statutory construction, viz., whether the offending portion of the definition was severable from the rest; for, if it was not severable, the entire definition would fail, so that the Appellant would be left without the protection of the Act.

Held, that the question of severability could arise only after the question of invalidity of the definition upon the constitutional question raised was decided, and that the case should, therefore, be withdrawn to the High Court for determination of the entire suit or the constitutional question only.<sup>6</sup>

3. Similarly, a subordinate Court shall refer a case to the High Court under this Article only if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, and that the determination of that question is necessary for disposal of the case. A mere plea in the defence is not sufficient for this purpose. Where the Court is not satisfied, it should go on with the trial, leaving it to the aggrieved party to move the High Court under this Article.<sup>7</sup>

#### 'Court subordinate to the High Court'.

This expression includes only 'courts' which are subject to the appellate or revisional jurisdiction of the High Court and not 'tribunals', e.g., an Anti-Ejectment Officer.<sup>8</sup>

#### 'Substantial question of law as to Interpretation of the Constitution'.

The following questions have been held to be substantial, for the purpose of application of Art. 228 :

(i) The questions (a) Whether the Madras Hindu (Bigamy & Prevention and Divorce) Act, 1949 is unconstitutional, and (b) whether, assuming that the Act is void, whether the petition is sustainable because the second marriage which gave rise to the alleged right of divorce took place before coming into force of the Constitution.<sup>9</sup>

1. *Bhoirabendra v. State of Assam*, A. 1955 Assam 154.

2. *Ganga Pratap v. Allahabad Bank*, A. 1958 S.C. 293 (295) : (1958) S.C.R. 1150.

3. *In re Rajarama*, A. 1952 Mad. 578.

4. *Inder Singh v. State of Rajasthan*, A. 1954 Raj. 185.

5. *Krishna v. Bhanumati*, A. 1952 Mad. 291.

(ii) Where a scheme has been framed under s. 57 of the Madras Hindu Religious Endowments Act and the issue is raised about the constitutional validity of that section, as offending Arts. 15 and 26 of the Constitution.<sup>6</sup>

#### Disposal of such case.

As regards disposal of such cases by the High Court, the Article makes a distinction between (a) cases solely involving constitutional questions, and (b) those where constitutional questions were mixed with questions of ordinary law. In the former class of cases, the High Court would dispose of the entire suit or case; while in the latter class of cases, the High Court would only dispose of the constitutional issues and return the case to the lower Court to determine the other issues in the ordinary way.<sup>7</sup> The High Court is given a discretion in the matter of disposal and in cases of small value or other proper cases, it may dispose of the entire case including ordinary questions.

#### S. 113, Proviso, C. P. Code and Art. 228.

Though there is some amount of overlapping between the two provisions, the Prov. to s. 113 of the Code has in view a question as to the validity of an Act or a part thereof, while Art. 228 relates to a question as to the interpretation of the Constitution, in general.<sup>8</sup>

Officers and servants and the expenses of High Courts.

<sup>1a</sup>229. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct :

Provided that the Governor of the State . . . . may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief justice to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. . . .

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

6. *Ramaswami v. Madras H. R. E. Board*, A. 1952 Mad. 20.

7. Cf. *Ganga Pratap v. Allahabad Bank*, A. 1958 S.C. 293 (295).

7a. Not applicable to Jammu & Kashmir.



**Cl. (1): 'Appointments'.**

The power to appoint includes the power to suspend or dismiss.<sup>8</sup>

**Proviso.**

1. The Proviso puts a limitation upon the power of appointment of officers and servants of a High Court which is given to the Chief Justice. Ordinarily, he need not consult the Public Service Commission in the matter of these appointments. But if the Governor makes a rule specifying any cases, the Chief Justice shall have to consult the Public Service Commission in making post-Constitution appointments to these specified posts.

2. There is no such limitation upon the power of dismissal belonging to the Chief Justice,<sup>9</sup> and Art. 320 (3) (c) is also not applicable to the staff of a High Court.<sup>10</sup> But Art. 311 is.<sup>11</sup>

**Cl. (2): Salaries, conditions of service etc.**

Subject to the Rules made under this clause, the Chief Justice is the sole authority for fixing the salaries etc. of, and controlling, the High Court employees. The Government cannot, therefore, apart from any power conferred by the Rules framed under Art. 229, fix the salary or authorise deduction of pay, of any High Court employee.<sup>12</sup>

*Extension of jurisdiction of High Courts to Union territories.*

**230.<sup>10-10a</sup>** (1) Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory.

(2) Where the High Court of a State exercises jurisdiction in relation to a Union territory,—

- (a) nothing in this Constitution shall be construed as empowering the Legislature of the State to increase, restrict or abolish that jurisdiction; and
- (b) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts in that territory, be construed as a reference to the President.

**231.<sup>10</sup>** (1) Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.

*Establishment of a common High Court for two or more States.*

(2) In relation to any such High Court,—

- (a) the reference in article 217 to the Governor of the State shall be construed as a reference to the Governors of all the States in relation to which the High Court exercises jurisdiction;

8. *Pradyat v. Chief Justice*, (1956) S.C.A. 79 (90) : A. 1956 S.C. 285.

9. *Akhil v. State of U.P.*, A. 1960 All. 193.

10. Substituted by the Constitution (Seventh Amendment) Act, 1956.

10a. Not applicable to Jammu & Kashmir.

(b) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts be construed as a reference to the Governor of the State in which the subordinate courts are situate ; and

(c) the references in articles 219 and 229 to the State shall be construed as a reference to the State in which the High Court has its principal seat :

*Provided that if such principal seat is in a Union territory, the references in articles 219 and 229 to the Governor, Public Service Commission, Legislature and Consolidated Fund of the State shall be construed respectively as references to the President, Union Public Service Commission, Parliament and Consolidated Fund of India.*

**Amendment.**—Arts. 230-1 have been substituted for the original Articles 230-2, by the **Constitution (Seventh Amendment) Act, 1956**, in view of the reorganisation of territories :

"While under article 214 there will normally be a separate High Court for each State, power will be required to establish common High Courts for two or more States. Power will also be required to extend the jurisdiction of a High Court to a Union territory, wherever necessary, and to exclude the jurisdiction of a High Court from such territory. The revised articles 230 and 231 are designed to make these provisions."<sup>11</sup>

## CHAPTER VI.—SUBORDINATE COURTS.

<sup>12a</sup>**233.** (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

### Cl. (1): Appointment by promotion.

Promotion cannot be claimed as of right, by virtue of seniority or the like.<sup>13</sup>

### Appointment by designation.

There is no contravention of this clause if the Government, with the assent of the High Court, appoints District Magistrates by designation as Assistant Sessions Judge.<sup>14</sup>

11. Statement of Objects and Reasons, *ibid.*

12. Art. 232 omitted *ibid.*

12a. Not applicable to Jammu & Kashmir.

13. Cf. *Rup Kishan v. Secy. of State*, A. 1943 All. 56.

14. *Palanisamy, in re*, I.L.R. (1957) Mad. 597 (600).



<sup>143</sup>**234.** Appointments of persons other than district judges to the judicial service of a State shall be

Recruitment of persons other than district judges to the judicial service.

made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the

High Court exercising jurisdiction in relation to such State.

**'Appointments'.**

This word does not exclude appointment by promotion.<sup>15</sup>

There is no constitutional bar to a magistrate being appointed to the civil judicial service, in compliance with Art. 234.<sup>16</sup>

**'After consultation'.**

Consultation is required in the matter of making the rules and of making the appointments.<sup>17</sup> If the rules referred to in Art. 234 are made without consultation with the Public Service Commission and the High Court, they are void.<sup>18</sup>

<sup>144</sup>**235.** The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge

Control over subordinate courts.

shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

**Art. 235: Control of Subordinate Judiciary.**

1. While the posting and promotion of District Judges shall be in the hands of the Governor acting in consultation with the High Court,—the posting and promotion, and granting of leave to officers of the State Judicial Service *other than District Judges* shall be exclusively in the hands of the High Court, subject, of course, to such appeal as are allowed by the law regulating conditions of the service.

2. Apart from the posting and promotion of the officers, the High Court shall have exclusive control not only over the subordinate Courts (*i.e.*, Courts subordinate to the District Courts) but also over the District Courts. See in this connection also the powers of superintendence conferred upon the High Court by Art. 227 (p. 433, *ante*).

3. The word 'including' makes it clear that the High Court has power of control not only over the subordinate Courts but also over the persons presiding over them.<sup>19</sup>

15. *Kesava v. State of Mysore*, A. 1956 Mys. 20 (25).

16. *Devasahayam v. State of Madras*, A. 1958 Mad. 53 (61).

17. *Ghouse v. State of A. P.*, A. 1959 A.P. 497 (503).

14a. Not applicable to Jammu & Kashmir.

Interpretation.

<sup>18</sup>**236.** In this Chapter—

- (a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge ;
- (b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

<sup>19</sup>**237.** The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

**Application of the provisions of this Chapter to certain class or classes of magistrates.** —In states where separation of the Judiciary from the Executive has been effected, notifications under this Article have been issued to bring under the control of the High Court the Magistrates exercising judicial powers.<sup>20</sup>

## PART VII

**Amendment.**—Art. 238, which was the only Article included in Part VII, contained the special provisions relating to States in Part B. With the abolition of States in Part B, Art. 238 becomes unnecessary and has, accordingly, been omitted by the **Constitution (Seventh Amendment) Act, 1956.**

## PART VIII

### THE UNION TERRITORIES<sup>1</sup>

**239.** <sup>2</sup>(1) *Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.*

*Administration of Union territories.*

18. Not applicable to Jammu & Kashmir.

19. Cf. *Ranga Rao v. State of Mysore*. A 1959 Mys. 199 (200).

1. Heading substituted by the Constitution (Seventh Amendment) Act, 1956.

2. Substituted by the Constitution (Seventh Amendment) Act, 1956.



(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the Administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers.

#### Union Territories.

The Constitution (Seventh Amendment) Act 1956 has replaced the States in Part C and territories in Part D of the First Schedule by the 'Union Territories', which under Part II of the First Schedule (as amended) are six in number,—Delhi; Himachal Pradesh; Manipur; Tripura; Andaman & Nicobar Islands; Laccadive, Minicoy & Amindivi Islands.

The provisions relating to the administration of the Union Territories do not materially differ from those relating to the administration of the Part C States, as was provided in repealed Arts. 239 and 240. They are to be administered by the Union, through an Administrator. The Part C States Act, 1951 has been repealed.

The provisions of the substituted Art. 239 have been supplemented by Territorial Councils Act, 1956.

#### A. Union Territory is a separate entity.

The President who is the executive head of a Union Territory is not functioning as the head of the Central Government, but as the head of the Union Territory under powers specifically vested in him under Art. 239. Under Art. 239, the President occupies in regard to Union Territories, a position analogous to that of a Governor in a State. Though the Union Territories are centrally administered under the provisions of Art. 239, they do not cease to be States and become merged with the Central Government.<sup>3</sup>

Hence,—

(a) A person who has entered into a contract with the Government of a Union Territory cannot be held to have entered into a contract with the Central Government, within the meaning of s. 7 (d) of the Representation of the People Act, 1951.<sup>4</sup>

(b) A suit against a Union Territory should be brought not against the Central Government but against the Administration of the Union Territory which consists of the President acting through the Administrator.<sup>4</sup>

*Power of President to make regulations for certain Union territories.* **240.** (1) The President may make regulations for the peace, progress and good government of the Union territory of—

(a) the Andaman and Nicobar Islands ;

(b) the Laccadive, Minicoy and Amindivi Islands.

(2) Any regulation so made may repeal or amend any Act made by Parliament or any existing law which is for the time being applicable to the Union territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to that territory.

3. *Satya Dev. v. Padam Dev*, A. 1954 S.C. 586 (591).

4. *Madhoprasad v. State of V. P.*, A. 1955 V.P. 1; *Tripura Administration v. Tripura State Bank*, A. 1959 Tri 41 (45).

4a. Substituted by the Constitution (Seventh Amendment) Act, 1956.

**241.** (1) Parliament may by law constitute a High Court for a *Union territory*<sup>5</sup> or declare any court in any such *territory*<sup>6</sup> to be a High Court for all or any of the purposes of this Constitution.

High Courts for  
Union Territories.

(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (1) as they apply in relation to a High Court referred to in article 214 subject to such modifications or exceptions as Parliament may by law provide.

(3) *"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of the Constitution (Seventh Amendment) Act 1956, in relation to any Union territory shall continue to exercise such jurisdiction in relation to that territory after such commencement."*

(4) *"Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court for a State to, or from, any Union territory or part thereof."*

**Cl. (2): 'Modifications'.**

The power to modify includes the power to make additions to the law which is modified.<sup>7</sup>

**Cl. (3): Judicial Commissioners.**

By reason of this clause, read with cl. (1), Judicial Commissioners are continuing to function in the Union Territories of Himachal Pradesh, Manipur and Tripura, and under the Judicial Commissioner's Court (Declaration as High Courts) Act, 1950,<sup>8</sup> a Judicial Commissioner is to be regarded as a High Court for the purposes of Arts. 132, 133 and 134, and also 215.<sup>9</sup>

But a Judicial Commissioner is not a High Court for the purposes of Arts. 216-8; 220-4; 230-2; the Second Schedule.<sup>10</sup>

**242. Omitted.<sup>11</sup>**

**PART IX<sup>12</sup>**

Part IX, which consisted of Art. 243, relating to the "Territories in Part D of the First Schedule and other Territories not specified in that Schedule", has been omitted by the Constitution (Seventh Amendment)

5. Substituted by the Constitution (Seventh Amendment) Act, 1956.

6. Clauses (3) and (4) substituted by *ibid.*

7. Cf. *Mithan v. State of Delhi*, A. 1958 S.C. 682.

8. See C3, Vol. II, p. 195.

9. *Vindhya Pradesh v. Vaf Nath*, A. 1951 V.P. 14.

10. *N. B. Singh v. W. L. Singh*, A. 1958 Manipur 38 (40).

11. Art. 242, relating to Coorg, has been omitted by the Constitution (Seventh Amendment) Act, 1956.

12. Omitted by the Constitution (Seventh Amendment) Act, 1956.



Act, 1956, since there is no such category of territory in the Constitution after this amendment.

But notwithstanding such repeal, the existing Regulations made under Art. 243 have been continued to be in force by s. 29 (2) of the Constitution (Seventh Amendment) Act, 1956, which says—

“(2) Notwithstanding the repeal of article 248 of the Constitution by the said Schedule, all regulations made by the President under that article and in force immediately before the commencement of this Act shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority.”

## PART X<sup>13</sup>

### THE SCHEDULED AND TRIBAL AREAS

**244.** (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State<sup>14</sup> . . . other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.

## PART XI

### RELATIONS BETWEEN THE UNION AND THE STATES

#### CHAPTER I.—LEGISLATIVE RELATIONS

##### *Distribution of Legislative Powers*

**245.** (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

##### **Nature of the Distribution of powers.**

As under the Government of India Act, 1935, there is a *threefold distribution* of legislative powers between the Union and the States, under the Constitution of India (Art. 246) made by the three Legislative Lists in the 7th Schedule of the Constitution:

List I or the *Union List* includes subjects over which the Union shall have exclusive powers of legislation, including 97 items or subjects. These include defence, foreign affairs, banks, currency and coinage, Union duties and taxes and the like.

13. Not applicable to the State of Jammu and Kashmir.

14. The words ‘specified . . . Schedule’ have been omitted by the Constitution (Seventh Amendment) Act, 1956.

List II or the State List comprises 66 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local Government, public health and sanitation, agriculture, forests and fisheries, education, State taxes and duties, and the like.

List III gives concurrent powers to the Union and the State Legislatures over 47 items, such as Criminal Law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, social insurance, economic and social planning.

The *residual power* belongs to the Union [Art. 248].

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists [Art. 246(3)].

In case of repugnancy between a law of a State and a law of the Union in the *concurrent* sphere, the latter will prevail. The State legislation may, however, prevail notwithstanding such repugnancy, if the State law was reserved for the President and has received his assent [Art. 254 (2)].

Under Article 249, the Union Parliament is empowered to make temporary laws overriding the normally exclusive powers of the State Legislature,—relating to matters enumerated in the State List, if by a special majority the Council of States declares that this is expedient in the national interest.

#### Extent of Union Legislation.

The Union Parliament, according to the present clause, has the power to legislate for the whole or any part of the 'territory of India' as defined in Art. 1 (3), p. 1, *ante*. But this territorial jurisdiction of Parliament is 'subject to the provisions of this Constitution'. In other words, the provisions of the present cl. (1) are to be read subject to any other provision of the Constitution which may modify the above jurisdiction of Parliament. For example, Art. 240 (2) says that as regards the Union Territories, Regulations made by the President may repeal or amend a law made by Parliament in relation to such territory and that such Regulations shall have the same force as Acts of Parliament. Similarly, para. 5 of the Fifth Sch. says that the application of Acts of Parliament to any Scheduled area may be barred or modified by notifications made by the Governor. See also para. 12 of the Sixth Schedule, *post*.

#### Extent of State Legislation.

1. While the Union Parliament has power to make laws for the whole or any part of the territory of India, the Legislature of a State can make laws only for the State or any part thereof. The legislative power of the State Legislature is thus confined to the territory of the State. The subjects included in the State List or in the Concurrent List (in relation to the State) must therefore be read as referring to objects situate within the territory of the State concerned, or objects as between which and that State there is a territorial nexus.

2. Cls. (1) and (2) of Art. 245, read together, imply that the State Legislatures under *our* Constitution shall have no extra-territorial powers.<sup>2</sup> But though a State Legislature is not competent to legislate as to matters outside its territory, it does not follow that a legislation

1. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (711).

2. *State v. Narayandas*, A. 1958 Bom. 68 (71).



which is in substance in respect of matters within the competence of that subordinate Legislature would be *ultra vires* simply because it may have possible effect outside that territory. Thus, when a State Legislature under our Constitution legislates with reference to public order, the enactment would not become *ultra vires* merely because it may have repercussions or consequences outside the State.<sup>3</sup>

3. Hence, when a statute is impugned as having an extra-territorial operation, the validity of that legislation "depends on the sufficiency of the purpose for which is used the territorial connection."

In the absence of such territorial nexus, a State legislation which deals with a subject-matter lying outside its territorial limits must be held to be *ultra vires*.<sup>4</sup>

4. Similarly, in a taxing statute, if there is a territorial nexus between the person to be charged and the State seeking to tax him, the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely, (a) the connection must be *real* and not illusory; and (b) the liability sought to be imposed must be pertinent to that connection. If the connection is sufficient in the sense mentioned above, the *extent* of such connection affects merely the policy and not the validity of the legislation. In other words, the fact that the liability imposed may be disproportionate to the territorial connection is of no importance on the question of validity of the statute.<sup>5</sup>

#### Illustration.

The newspaper 'Sporting Star', printed and published in Bombay, has a wide circulation in the State of Bombay, where they have also collection depots to receive entry forms and fees for participation in their prize competitions. Held, that the standing invitations, the filling up the forms and the payment of money within the State of Bombay constitute sufficient territorial nexus which entitles that State to tax the amount received by the newspaper from within its boundaries.<sup>6</sup>

#### State Legislature, not a delegate of the Union Parliament.

The State Legislature under our Constitution is not a delegate of the Union Parliament. Both Legislatures derive powers from the same Constitution. Within its appointed sphere, the State Legislature has plenary powers.<sup>7</sup>

Since both the Union and State Legislatures derive their respective powers from the same written Constitution which divides the legislative powers between them, one Legislature cannot by delegation of subjects that are exclusively within its field clothe the other with legislative capacity to make laws on that subject. Hence, the Union Legislature cannot delegate or transfer its power to the State Legislature, and *vice versa*.<sup>8</sup>

#### Competence to make retrospective legislation.

1. The power of Parliament and the State Legislature to make laws is conferred by Arts. 245, 246 and 248. There is nothing in these

3. *Siddique v. Prov. of Bihar*, [1949] 4 D.L.R. 29 (Pat.).

4. *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661 (Venkatarama J.).

5. *State v. Narayandas*, A. 1958 Bom. 68 (71) F.B.

6. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (712).

7. *State v. Narayandas*, A. 1958 Bom. 68 (70).

8. *In re Delhi Laws Act*, 1912, (1951) S.C.R. 747, Mahajan J.

Articles to provide that the Indian Legislatures do not possess the right to make retrospective legislation which every sovereign Legislature possesses. The only limitation imposed upon the power of retrospective legislation is that contained in Art. 20 (1), viz. that it cannot make retrospective *penal* laws. Any other law may, therefore, be made retrospective under the Constitution,<sup>9</sup> including taxing laws.<sup>10</sup>

2. The power of such retrospective legislation is not affected by anything in the Government of India Act, 1935. The Constitution does not restrict or limit the legislative competence of Parliament so as to make it exercisable only with regard to that part of the territory of India or only with regard to those subjects in regard to which the Dominion Legislature had, before 26-1-50, the power to legislate. It is to the provisions of the present Constitution that we must look for determining the powers of Parliament.<sup>11-12</sup>

### Competence to override a judicial decision.

1. In India, it is competent for the Legislature to put an end to the finality of judicial decision and reopen a past controversy, and even to pass a validating Act to declare to be valid a law which has been pronounced to be void by the Court. By so enacting, the Legislature does not exercise a judicial function.<sup>11,12</sup> It is competent for the Legislature to rectify a mistaken view of the law.<sup>13</sup>

2. If, however, a law is declared invalid on the ground of contravention of fundamental rights, the Legislature cannot undo that decision by anything short of amendment of the Constitution, because the Courts are constituted the guardian of the fundamental rights guaranteed by the Constitution,<sup>14</sup> and the Legislature cannot violate the provisions of the Constitution as interpreted by the Courts.<sup>15</sup>

3. It can confer jurisdiction upon a Court with retrospective effect and validate sentences passed without jurisdiction.<sup>12,16</sup>

4. Nor can the Legislature assume the power of adjudicating a case by virtue of its enactment without leaving it to the Judiciary to decide it with reference to the law in force.<sup>17</sup> Thus, the Legislature cannot declare any pending judicial proceeding to be invalid and discharged.<sup>18-20</sup>

5. Nor can the Legislature, while validating a legislation against a judicial decision, bar the jurisdiction of the High Court under Art. 226 to adjudicate future disputes relating to the subject,<sup>21</sup> or make it obligatory upon the High Court to review its previous decisions under Art. 226 and to pass an order as provided in the Validating Act, irrespective of the merits of such cases,<sup>22</sup> or override the other provisions of the Constitution, such as Art. 14.<sup>23</sup>

9. *Shanta v. Custodian of E. P.*, A. 1952 M.B. 181 (187); *Chhotabhai v. Union of India*, A. 1952 Nag. 139 (142).

10. *Union of India v. Madangopal*, (1954) S.C.R. 541; (1952-4) C.C. 528.

11. *Jadoo v. Khandwa Municipality*, A. 1956 Nag. 168 (171).

12. *Gulabrao v. Pandurang*, A. 1957 Bom. 266 (268) F.B.

13. *Viswanathan v. Kanaran*, A. 1956 Mad. 604.

14. *Brif Bhukan v. S. D. O.*, A. 1955 Pat. 1 (S.B.).

15. *Piire Dnsadh v. Emp.*, A. 1944 F.C. 1.

16. *Biharilal v. Ramcharan*, A. 1957 M.P. 165 (168).

17. *Polli v. Narsingh*, A. 1955 Hyd. 257.

18. *Basanta v. Emp.*, A. 1944 F.C. 86.

19. *Gulabrao v. Pandurang*, A. 1957 Bom. 266.

20. *Adarsh Bhandar v. S. T. O.*, A. 1959 All. 557.

21. *Bhupendra v. State of Orissa*, A. 1960 Orissa 46.



### Competence to override contracts.

Contractual rights and obligations are not guaranteed by our Constitution against legislative interference. Hence, the legislative competence of the Legislatures in India are not fettered by the terms of any grant<sup>22</sup> or contract<sup>23</sup> made by the Government.

### The Legislature cannot delegate its essential functions.

1. Though our Constitution has not admitted the doctrine of Separation of Powers nor embodied any express prohibition against delegation of powers by the Legislature to the Executive or any subordinate body, our Supreme Court has held that the Legislature, under our Constitution, cannot delegate its essential functions which have been entrusted to it by the Constitution.<sup>24,1</sup>

(i) The essential legislative functions are the determination of the legislative policy and its formulation as a rule of conduct.<sup>24</sup> In other words, the Legislature cannot delegate to another agency the exercise of its judgment on the question as to what the law should be.<sup>24</sup>

(ii) The power to modify an Act in its essential particulars (so as to involve a change of policy<sup>25</sup>) is also an essential legislative function.

"To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely, the power to legislate, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered."<sup>22</sup>

It follows that the conferment of the power on the Executive to modify an Act without any limitation on the power to modify constitutes an unconstitutional delegation of legislative function. For, in making modification, the whole aspect of an Act or a section may be changed.<sup>2</sup>

### Illustration.

S. 2 of the Part C States (Laws) Act, 1950, provided—

"The Central Government may by notification . . . extend to any Part C State . . . with such restrictions or modifications as it thinks fit any enactment which is in force in a Part A State . . . and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

As regards the second part of the section, it was held (per Kania C.J., Mahajan, Mukherjea and Bose JJ.) that the power to repeal or amend laws is a power which can only be exercised by an authority that has the power to enact laws and it is a power co-ordinate and co-extensive with the legislative power itself. In bestowing on the Government and clothing it with the same capacity as is possessed by the Legislature itself, Parliament has acted unconstitutionally.<sup>2</sup>

22. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252, Mahajan J.

23. *Barada Kant v. State of Assam*, A. 1958 Assam 23; *G. P. W. & T. Depl. v. A. G. Factory*, A. 1959 A.P. 538 (542).

24. *In re Delhi Laws Act*, (1951) S.C.R. 747 (Kania C.J., Mahajan, Mukherjea & Bose JJ.).

25. *State of Bombay v. Narottamdas*, (1951) S.C.R. 51 (Mahajan, Mukherjea & Das JJ.).

1. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

2. *Sarat v. Calcutta Corp.*, A. 1959 Cal. 36 (44).

3. *In re Delhi Laws Act*, (1951) S.C.R. 747 (1124) : (1950-51) C.C. 328 (376-7).

On the other hand—

The delegation of a power to modify would not be unconstitutional if it relates not to the legislative policy but to matters of detail which may be considered as *not essential* to the legislative function.<sup>4</sup>

#### *Illustration.*

Section 6 of the C.P. and Berar Sales Tax Act, 1947 provided—

- “(1) No tax shall be payable under this Act on the sale of goods specified in the second column of Schedule II . . . .  
(2) The State Government may . . . by notification . . . . . amend either Schedule, and thereupon such schedule shall be deemed to be amended accordingly”.

It was contended that sub-section (2) of section 6 was unconstitutional delegation in as much as it delegated the power to modify the Act itself. *Held* that the power to modify related to a selection of the objects which may be exempted from the tax imposed by the Act and did not involve a change of the policy upon which the legislation was based, even though it enabled the Government to withdraw an exemption granted by the Legislature itself, and was, accordingly, valid.<sup>4</sup>

(iii) The Legislature cannot delegate to the executive the power to make *exemptions* from the operation of an Act, without laying down the policy for the guidance of the latter.<sup>4a</sup>

(iv) Prescribing an offence and its punishment is essentially a legislative act.<sup>7</sup>

But a Legislature may delegate the power of rule-making and provide the penalty for violation of the rules. But instead of prescribing the precise penalty, it may lay down the limit or the standard, leaving it to the administrative body to prescribe the penalty within such limits or in accordance with the standard laid down.<sup>7</sup>

#### **Ascertainment of the legislative policy.**

The legislative policy has to be ascertained by the Court from the provisions of the Act, including its Preamble ; and, where the impugned Act replaces another Act, the Court may even look into the provisions of the Act in order to determine whether the Legislature has conferred unguided power to the Executive.<sup>8</sup>

#### *Illustrations.*

A. (i) The preamble of the Essential Supplies (Temporary Powers) Act, 1946 stated that it was intended to provide for the continuance, during a limited period, of powers to control the production, supply and distribution of and trade and commerce in certain commodities which were deemed to be essential. Such commodities were specified in section 2 of the Act, and section 3(1) provided—

“The Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing the supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein . . . .”.

4. *Vamarsi v. State of M.P.*, A. 1958 S.C. 909 (S. R. Das C.J., Venkatarama Aiyar, Das, Sarkar JJ ; Bose J. did not concur).

5. *Sarat v. Calcutta Corpn.*, A. 1959 Cal. 36 (44).

6. *Dwarka Prasad v. State of U. P.*, A. 1954 S.C. 224.

7. *D. N. Ghose v. Addl. Sessions Judge*, (1959) 63 C.W.N. 147 (156).

8. *Bhatnagar v. Union of India*, A. 1957 S.C. 478 (486).



*Held*, the delegation made by section 3(1) to the Central Government was not excessive or unconstitutional inasmuch as the preamble and the body of the section sufficiently formulated the legislative policy and the subordinate authority to whom the power to make an order was delegated was to exercise that power within the framework of that policy.<sup>9</sup> In other words, the Legislature had declared its decision that the commodities in question were essential for the maintenance and progress of national economy and it had also expressed its determination that in the interest of national economy it was expedient that the supply of the said commodities should be maintained or increased as circumstances may require and the commodities should be made available for equitable distribution at fair prices. The concept of 'fair prices' introduced by the Legislature gives sufficient guidance to the Central Government in prescribing the price structure for commodities from time to time. The delegation cannot, therefore, be held to be uncanalised or unguided<sup>10</sup>.

(ii) S. 3 of the All-India Services Act, 1951 empowers the Central Government to frame rules for the regulation of the conditions of service of members of the All-India Services. S. 4 then says—

"All rules in force immediately before the commencement of this Act and applicable to an all-India service shall continue to be in force and shall be deemed to be rules made under this Act."

Negating the contention that Parliament had not laid down any policy or standard for the making of rules under the Act but left it entirely to the Central Government, the Supreme Court observed that the Legislature determined the legislative policy by simply adopting the 'existing rules' and the power conferred upon the Central Government was to frame rules "which may have the effect of adding to, altering, varying or amending the rules accepted under s. 4 as binding. It cannot, therefore, be held that the Legislature had not laid down any policy or standard for the guidance of the Central Government.

An additional ground upon which the delegation was upheld as permissible was that under s. 3 (2) of the Act the rules so framed were to be laid before Parliament for the specified period for the approval, repeal or modification by Parliament, so that it could not be said that Parliament had 'abdicated' its authority.<sup>11</sup>

(iii) After defining the conditions of a 'ceiling area' and an 'economic holding' in ss. 5-6, the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 provided, in s. 7—

"Notwithstanding anything contained in ss. 5 and 6, it shall be lawful for the State Government, if it is satisfied that it is expedient so to do in the public interest to vary, by notification . . . the acreage . . . of the ceiling area or economic holding . . . , having regard to—

- (a) the situation of the land,
- (b) its productive capacity,
- (c) the fact that the land is located in a backward area, and
- (d) any other factors which may be prescribed<sup>12</sup>.

It was contended that the words 'any other factors' gave uncharted discretion to the Government to prescribe factors for the benefit of particular individuals or groups on extraneous considerations. This contention was negated by the Supreme Court, observing that the policy of the Act was to be found from the Preamble which stated that it was to amend a previous Act of 1948, and this Act of 1948 sets out the objectives

9. *Hari Shankar v. State of M.P.*, A. 1954 S.C. 465.

10. *Union of India v. Vhanamal*, A. 1960, S.C. 475 (479).

11. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (518).

to be achieved. The power to vary the ceiling area and economic holding was also governed by the factors laid down by the Legislature in Cls. (a)-(c). The words "any other factors" "would be factors *ejusdem generis* to the factors mentioned earlier in the section and could not be any and every factor which crossed the mind of the executive. The power was also circumscribed by the general condition that it must be exercised "in the public interest." Of course, the determination of the public interest was left to the subjective satisfaction of the Government, but if the power was abused, the notification so issued would be liable to be invalidated on that ground, but the law could not be invalidated as constituting an excessive delegation of the legislative power, on the ground that the subjective power could be abused<sup>12</sup>.

B. On the other hand—

Section 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 provides—

"Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for—

- (a) the procurement of miscarriage in women or prevention of conception in women; or
- (b) the maintenance or improvement of the capacity of human beings for sexual pleasure; or
- (c) the correction of menstrual disorder in women; or
- (d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in rules made under this Act."

Held, that the words in clause (d) above "or any other disease or condition which may be specified in rules" conferred uncanalised and uncontrolled power to the Executive to specify any disease and make the Act applicable thereto. The Court observed that "Parliament has established no criteria, no standards, and has not prescribed any principle on which a particular disease or condition is to be specified. . . . It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in section 3(d) must, therefore, be held to be going beyond permissible boundaries of valid delegation". The Court accordingly struck down this portion of section 3(d)<sup>13</sup>.

12. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (474).

13. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554 (568). [It is to be noted that the decision in the instant case is in striking contrast to the case of *Sri Ram v. State of Bombay* (A. 1959 S.C. 459). The impugned provisions of the enactments in both the cases were similar in so far as the Legislature added a residuary clause, after enumerating certain specific cases where the power could be exercised. But while in *Sri Ram's* case the court applied the *ejusdem generis* rule for interpreting the residuary power that doctrine was not mentioned at all in the unanimous judgment in the *Hamdard* case.

The decision in the instant case is also at variance with that in a number of previous cases (see p. 457 *ante*) where the legislative policy was taken as the standard for determining whether the power of subordinate legislation was uncanalised or not. In the instant case, the court analysed the history of the legislation and the different provisions of the statute and had no difficulty in discovering the policy and purpose of the legislation (page 561, *ibid*) and found that the object of the Act "was to control the advertisement of drugs in certain cases,



### Functions which may be delegated.

(a) A Legislature, while legislating, cannot foresee and provide for all future contingencies. Where the Legislature lays down the policy and does no more than enable a duly authorised officer to meet contingencies and deal with various situations as they arise, there is no 'delegation of legislative authority'.<sup>14, 15</sup>

### Illustration.

The Bombay Prohibition Act provided for the granting of permits (for consumption of liquor) on grounds of health and some other exceptional circumstances. But by ss. 52, 53 139(c), power was given to Government—(a) to grant licences in cases other than those specifically provided in the Act; (b) to vary or substitute any of the conditions of the licence laid down in the Act; (c) to exempt any person or institution from the observance of all or any of the provisions of the Act or any rule or regulation made thereunder. The High Court held that by the specific provisions, the Legislature had laid down the policy according to which exemptions from the law of prohibition might be granted by the Executive, in whole or in part, and that by the sections referred to above, the Legislature gave the Executive the power to alter that policy itself. The Supreme Court, however, held that the policy of the Act was that exemption might be made in exceptional case but that it was not possible for the Legislature to foresee all the particular cases where the exemption could possibly be allowed. Hence the Legislature simply mentioned some instances by way of specific enumeration and empowered the Executive to consider the question of exemption in other cases as they might arise and that this was not the conferment of the power to alter the legislative policy and that there was no delegation of legislative power but the power to administer the law.<sup>4</sup>

i.e., diseases and to prohibit advertisements relating to remedies pertaining to have magic qualities and provide other matters connected therewith." The danger aimed at was found to be the danger of 'self-medication' and 'the consequences of unethical advertisements' relating thereto. If the policy was thus ascertained, and the preceding clauses of section 3 specified advertisements relating to the procurement of miscarriage; the improvement of sexual capacity; the correction of menstrual disorder and the treatment etc. of a venereal disease, was it not possible to hold that the impugned part of clause (d) related to a disease or condition *ejusdem generis* with the preceding categories, consonant with the policy of the enactment as ascertained by the Court? In the circumstances, was it not possible for the Court to hold, as in previous cases, that the Legislature was not guilty of unconstitutional delegation but that if the subordinate authority ever made a rule specifying a disease or condition which was extraneous to the policy of the enactment and not *ejusdem generis* with the categories enumerated, the rule itself would be void on the ground of *ultra vires*?

Since the judgment in the instant case does not refer at all to the previous decisions on delegated legislation it is difficult to suggest any ground which led the Court in the instant case to distinguish it from the previous line of decisions. It remains for a future Bench to perform that task).

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682.

15. See also *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (474), above.

(b) There is no unconstitutional delegation of legislative power in the usual 'removal of difficulty' clause. The clause is worded in some such way—

"If any difficulty arises in giving effect to the provisions of this Act, the Government may, as occasion may arise, by order do anything which appears to them necessary for the purpose of removing the difficulty."

It is not possible for the Legislature to foresee the difficulties which may arise only when the machinery of the Act is put into actual operation. The Legislature does not abdicate its functions if it lays down the essential principles underlying the legislation and merely gives to the Executive a limited power of removing difficulties 'for the purpose of giving effect to the provisions of the Act', without the power of modifying those essential principles.<sup>16, 17</sup>

(c) The power to extend the operation of an Act may be delegated.<sup>18</sup>

In the pre-Constitution case of *Jalindranath v. Prov. of Bihar*,<sup>19</sup> Kania C.J. held that the power to extend, *per se*, could not be delegated as it was "for the Legislature to determine how long a particular legislation will be in operation". The observations of Mukherjea J. suggested that the power to extend was a legislative power, but where the Legislature itself fixed a maximum period of duration for an enactment and then authorised the Executive to give effect to the Act within that maximum period, according to the exigencies of the situation then prevailing.

After the commencement of the Constitution, the question of extension of duration was exactly raised in *Joylal v. State*.<sup>20</sup>

It is to be noted that Kania C.J. and Mukherjea J. were parties to the decision in *Jalindranath's case*<sup>19</sup> as well as *Joylal's*,<sup>20</sup> and also that there was no detailed discussion of the question. The only conclusion that could be made from the decision in *Joylal's case* is that the Supreme Court affirmed the proposition that the power to extend was a legislative power but that there was no delegation of this power when the Legislature itself fixed the maximum period within which the power to extend was to be exercised by the delegates.

In *Inder Singh v. State of Rajasthan*,<sup>21</sup> it was not possible for the Supreme Court to avoid the basic question inasmuch as in this case, no maximum period had been fixed by the legislative authority. S. 3 (1) of the impugned Ordinance provided—

"It shall remain in force for a period of two years unless this period is further extended by the Rajpramukh by notification in the Rajasthan Gazette."

It was a case of delegation of the power to extend the duration of the law, without limitation. It is somewhat unfortunate that the Court made no reference to its interim pronouncement in *Joylal's case*.<sup>20</sup> It took pains to demonstrate that in *Jalindranath's case*,<sup>19</sup> the observations were coloured by the fact that a power to modify the law had also been conferred and that the case could not be taken as a conclusive decision on the question whether the power to extend, without more, could be delegated. In any case, the Court, speaking through Venkatarama Ayyar J., clearly observed—

"We are unable to agree with the statement of the law in *Jalindranath v. State of Bihar*,<sup>19</sup> that a power to extend the life of an enactment cannot validly be conferred on an outside authority."

16. *Sushibhusan v. Mangala*, A. 1953 Orissa 171 (175).

17. *Panchayat v. State of Andhra*, A. 1957 Andhra 355 (362, 364).

18. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.

19. *Jalindranath v. Prov. of Bihar*, (1949) F.C.R. 595.

20. *Joylal v. State*, (1952) S.C.R. 127.

21. *Inder Singh v. State of Rajasthan*, A. 1957 S.C. 510.



It is, thus *settled* that power to extend the duration of a statute is not an essential legislative power and may be delegated.

(d) There is no unconstitutional delegation where the Legislature permits the Executive, at its discretion, to *adapt* (with incidental changes such as name, place and the like) existing statutes and to *apply* them to a new era,—*without modifying the policy* underlying the statute.<sup>22</sup>

(e) Once, the essential legislative function is performed by the Legislature by declaring the policy, the extent of delegation is a matter for the discretion of the Legislature and the Court is not competent to say that the Legislature should not have gone beyond a certain limit,<sup>23</sup> or that it should have provided a different standard.<sup>24</sup>

(f) A delegation cannot be held to be unconstitutional if the rules are required to be laid before Parliament before they are to come into force and Parliament has the power to amend, modify or repeal them.<sup>25</sup>

### Permissible delegation in taxing legislation.

The power to impose and assess a tax is essentially a legislative function.<sup>1,2</sup>

The Legislature must, therefore, either prescribe the rate of taxation itself or formulate a policy for fixation of the rate by a subordinate authority.<sup>3,4</sup>

Hence, the Legislature may not authorise the Government to levy a tax 'at such rates as the Government may determine'.<sup>5</sup>

But no unconstitutional delegation is involved—

(a) Where the Legislature fixes a maximum rate of the imposition (*e.g.*, a cess) and authorises the Executive to determine the rate not exceeding the maximum prescribed by the Legislature, according to the exigencies of the public revenue.<sup>6</sup>

If, however, the maximum rate is included in a Schedule and the Executive is given an unguided and unlimited power to vary that Schedule itself, the delegation must be struck down as delegation of the power to modify the policy laid down by the Legislature.<sup>8</sup>

There has been a controversy as to whether a State Legislature is competent to authorise a local authority to impose a tax, without fixing a maximum limit to the rate which the local authority may determine.

(A) The Calcutta<sup>9</sup> and Madras<sup>4</sup> High Courts have held that fixation of the rate of a tax being an essential legislative function, the Legislature cannot delegate the function to a Municipal body, unless the Legislature itself fixes a maximum limit,<sup>1,4</sup> or lays down the policy for fixing the rate.<sup>8</sup>

22. *Rajnarain v. Chairman, Patna Administration*, A. 1954 S.C. 569.

23. *Chimanlal v. State of Bombay*, A. 1954 Bom. 397.

24. *Union of India v. Bhanmal*, A. 1960 S.C. 475 (481).

25. *Gureval v. State of Punjab*, A. 1959 S.C. 512 (see p. 457, ante).

1. *Rajnarain v. Chairman Patna Administration*, (1955) 1 S.C.R. 290.

2. *Muril v. State of U. P.*, A. 1957 Ail. 159 (163).

3. *Shanmugha Oil Mill v. Market Committee*, A. 1960 Mad. 160 (168).

4. *Sarat Chandra v. Calcutta Corporation*, A. 1959 Cal. 36, affirmed by *Calcutta Corpn. v. Sarat*, A. 1959 Cal. 704 (708).

5. *Damodaran v. State*, A. 1960 Ker. 58 (60).

6. *Damodaran v. State*, A. 1960 Ker. 58.

(B) The Assam<sup>7</sup> and Bombay<sup>8</sup> High Courts have held that Entry 5 of List II ('local self-government') is so wide that it would enable the State Legislature to confer upon a local authority the powers of local self-government, including the levy of a tax for that purpose. The Legislature can, accordingly, authorise a local authority to levy a tax which it would have itself levied, for the purposes of local self-government.

The Patna High Court<sup>9</sup> has supported such delegation, without fixing a maximum, on the ground that in the case of a fee, such as water rate, it was impossible for the Legislature to calculate the cost of the service from time to time.<sup>8</sup> The Bombay case<sup>8</sup> was also one of water rate and the court held that the Legislature must be deemed to have laid down the policy for fixing the rate, namely, that the rate charged should have a relationship with the cost of providing the water supply.

It is doubtful whether this extreme position is sound in view of the fact that in the case of *Western India Theatres v. Municipal Corpn.*<sup>10</sup> (see below), the Supreme Court upheld the validity of s. 59 (xi) of the Bombay District Municipalities Act, 1901, on the ground, *inter alia*, that the Governor-in-Council had retained his power of control over the municipal authority by providing that the Municipality could levy the tax only after obtaining the sanction of the Governor-in-Council.

It is now settled that the taxing power under the 7th Schedule of the Constitution is separate from the general Entries conferring legislative power. Entry 5 of List II which empowers the State Legislature to confer powers upon local authorities has, therefore, nothing to do with the taxing power. The taxing power, say, under Entry 49 or 58, belongs to the State Legislature and if it wants to confer the same power upon a local authority, it will be a case of delegated legislation and its validity must, accordingly, have to be tested by the principles relating to delegated legislation. The real question, therefore, is whether fixing the rate is an essential legislative function; if it is, the Legislature cannot confer that power upon the local authority without itself laying down the policy or the limits subject to which only the delegated power may be exercised.

Of course, if the delegation relates not to a 'tax' but to a 'fee', there is an implied maximum limit inasmuch as it will not be valid unless correlated to the expenses of the services rendered for which the fee is to be levied.<sup>11</sup>

(b) There is no delegation of legislative authority where a Legislature lays down the principles for levying a tax but authorises the executive to set up the machinery for collection of the tax.<sup>12</sup>

(c) The following are not 'essential legislative functions' and may be delegated; the power to select the persons on whom the tax is to be laid; the power to amend the schedule of exemptions;<sup>13</sup> the determination of the rates at which it is to be charged in respect of different classes of goods;<sup>12</sup> the choice of the particular tax suited to the purposes of the Act and within the competence of the Legislature concerned.<sup>14</sup>

7. *Ajoy v. Local Board*, A. 1959 Assam 221.

8. *Hirabhai v. State of Bombay*, A. 1955 Bom. 185.

9. *Nathani v. State of Bihar*, A. 1956 Pat. 482 (488).

10. *Western India Theatres v. Municipal Corpn.*, A. 1959 S.C. 586.

11. *Liberty Cinema v. Calcutta Corpn.*, A. 1959 Cal. 45 (51).

12. *Chaudhry v. State of Bihar*, A. 1957 Pat. 40.

13. *Banarasi Das v. State of M. P.*, A. 1958 S.C. 909 (913).



*Illustration.*

S. 59 of the Bombay District Municipalities Act, 1901 empowered the Bombay Municipal Corporation to levy certain specified heads of taxes and then contained the following residuary head—

"Any other tax to the nature and object of which the approval of the Governor-in-Council shall have been obtained prior to the selection contemplated in sub-cl. (1) of cl. (a) of s. 60".

The Corporation levied a tax on cinema houses at a rate per show. The validity of the tax was challenged on the ground that the residuary clauses of the Act referred to was void by reason of the Legislature having delegated an unguided and uncanalised power to the Municipality to levy any tax it liked. The Supreme Court rejected this contention on the grounds—(a) that the power of the Municipality under the above clause was defined by the powers of the Legislature itself, so that it cannot be said to have been empowered to levy a tax such as income-tax, which the Bombay Legislature itself could not levy; (b) that within the taxes which the Legislature was competent to levy, the choice of the Municipality was limited by the words at the beginning of s. 59 which stated that the Municipality could impose taxes "for the purpose of the Act". Hence, the Municipality could impose only such taxes as had "some reasonable relation to the duties cast on it by the Act", so that it could impose a lighting tax for the purpose of discharging its duty of lighting public streets, or impose a water rate for the water supplied by it, and so on. The delegation was not, therefore, uncanalised or excessive. (c) Lastly, the Legislature had not abdicated its function inasmuch as the exercise of the impugned power was subject to the prior approval of the Governor-in-Council who constituted the Provincial Legislature at that time.<sup>14</sup>

**Sub-delegated legislation.**

1. The principles discussed above have also been applied to test the validity of sub-delegated legislation. Thus, it has been held that where the Legislature has performed its essential duty by laying down the policy, it cannot only delegate the function of making *subordinate* and *ancillary* legislation but also empower the delegates to redelegate the function to sub-delegates who are specified in the statute itself.<sup>15</sup> Specification by class is sufficient for this purpose.<sup>16</sup>

*Illustration.*

S. 3 of the Essential Supplies Act, 1946, empowered the Central Government to regulate or prohibit the production etc. of essential commodities by notified order, so far as it appears to the Central Government to be necessary or expedient for maintaining or increasing supplies of any essential commodity.

S. 4 next provided—"The Central Government may by notified order direct that the power to make orders under s. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such officer subordinate to the Central Government or such Provincial Government or such officer subordinate to a Provincial Government, as may be specified in the direction."

Held, s. 4 was not invalid on account of authorising sub-delegation of the power to make orders under the Act, since only powers *ancillary* to legislative power had been permitted to be delegated or sub-delegated the Act itself having laid down the legislative policy,<sup>17</sup> which would

14. *Western India Theatres v. Municipal Corpn.*, A. 1959 S.C. 586.

15. *Harishankar v. State of M. P.*, A. 1954 S.C. 465.

give ample guidance to the sub-delegate in the same way as it would have guided the delegate (i.e., the Central Government) if it had chose to issue the orders itself instead of sub-delegating it.<sup>16</sup>

2. But the sub-delegate cannot exercise the function unless the delegate has sub-delegated the function specifically and in terms of the statute which authorises the sub-delegation.<sup>17</sup> Thus it cannot be made with retrospective effect in the absence of a specific provision in the statute authorising such retrospective sub-delegation.<sup>18</sup>

3. In making the sub-delegation, the delegate may further canalise the power to be exercised by the sub-delegate, provided they are in consonance with the policy declared by the Legislature.<sup>19</sup>

4. In the absence of any restriction imposed by the delegate, or the statute, it is competent for the sub-delegate to issue either a specific order against an individual or a general order applicable to a class of persons generally.<sup>20</sup>

### Conditional and Subordinate Legislation permissible.

But though the Legislature cannot delegate its essential legislative functions, it can entrust the administration or application of a law to the Executive or some other body. Thus, after laying down the legislative policy—

(i) The Legislature may leave it to the judgment of a local administrative body as to the necessity of applying or introducing the Act in a local area; or the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate.<sup>21,22</sup> This is known as 'conditional legislation'.

(ii) The Legislature may lay down the policy of the legislation and then leave it to a subordinate agency or some executive authority, the power of making rules and regulations for filling in the details to carry out the purposes of the legislation.<sup>23,24</sup> When legislative power is so exercised by an administrative or other subordinate law-making body, under statutory authority, it is known as 'subordinate legislation'. On the part of the Legislature, it is delegated legislation, but it is a permissible delegation if it has laid down the policy.<sup>25,26</sup>

### Conditions of validity of conditional legislation.

1. There is no delegation of essential legislative power if the Legislature has laid down the policy of the enactment. Conditional legislation, therefore, is valid only where the policy has been laid down by the law itself and no part of it is left to be determined by the administrative authority, who is authorised to select the time, when or the area or the objects to which the Act is to apply, having regard to the policy of the law, as well as the local conditions and other exigencies.<sup>27,28</sup>

16. *Union of India v. Bhanamal*, A. 1960 S.C. 475 (480) [Cl. 11B of the Iron & Steel (Control of Production and Distribution) Order, 1941, held valid].

17. *Dawood Ali v. Commr. of Police*, A. 1958 Cal. 565 (567).

18. *Shivdev v. State of Punjab*, A. 1959 Punj. 453 (456).

19. *Santosh Kumar v. State*, (1951) S.C.R. 303.

20. *In re Delhi Laws Act*, (1951) S.C.R. 474 (Kania C.J., Mahajan J.).

21. *Indar Singh v. State of Rajasthan*, A. 1957 S.C. 510 (515).

22. *Bhatnagars v. Union of India*, A. 1957 S.C. 478 (485).

23. *Hamdard Dawakhana v. Union of India*, A. 1960 S.C. 554 (556).

24. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (473-4).

25. *State of Bombay v. Narottamdas*, (1951) S.C.R. 51.

1. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.



*Illustrations.*

(i) The Bombay City Civil Court Act, 1948 created an additional Civil Court for Greater Bombay, having jurisdiction to try all suit not exceeding Rs. 10,000 in value and by s. 4 provided that the State Government might by notification raise the jurisdiction of this Court to try suits up to Rs. 25,000 in value. Held, s. 4 was an instance of conditional and not delegated legislation. For, the section itself shows that the Legislature, having exercised its judgment and determined that the new Court should be invested with jurisdiction to try suits up to Rs. 25,000 in value, had left it to the Provincial Government to determine when the Court should be invested with this larger jurisdiction. It is clear that if and when the new Court has to be invested with the larger jurisdiction, that jurisdiction would be due to no other authority than the Provincial Legislature itself and by virtue of the Act. "The law was full and complete when it left the legislative chamber permitting the Provincial Government to increase the pecuniary jurisdiction of the City Court up to a certain amount which was specified in the statute itself. What the Provincial Government is to do is not to make any law; it has to execute the will of the Legislature by determining the time at which and the extent to which, within the limits fixed by the Legislature, the jurisdiction of the Court should be extended."

(ii) The Minimum Wages Act, 1948, was enacted to provide for "fixing minimum rates of wages in certain employments." The Act contains a Schedule of employment to which the Act would apply and s. 27 then empowers the appropriate Government to add to the Schedule "any employment in respect of which it is of opinion that minimum rates of wages should be fixed under the Act" Held, there was no delegation of legislative power involved in so empowering the Government to add to the Schedule of employments to which the Act would apply. For, the legislative policy was "apparent on the face of the enactment."

"What it aims at, is the statutory fixation of minimum wages with a view to obviate the chance of exploitation of labour. The legislature undoubtedly intended to apply this Act not to all industries but to those industries only where by reason of unorganized labour or want of proper arrangements for effective regulation of wages or for other causes the wages of labourers in a particular industry were very low. It is with an eye to these facts that the list of trades has been drawn up in the schedule attached to the Act but the list is not an exhaustive one and it is the policy of the legislature not to lay down at once and for all time, to which industries the Act should be applied. Conditions of labour vary under different circumstances and from State to State and the expediency of including a particular trade or industry within the schedule depends upon a variety of facts which are by no means uniform and which can best be ascertained by the person who is placed in charge of the administration of a particular State. It is to carry out effectively the purpose of this enactment that power has been given to the "appropriate Government" to decide, with reference to local conditions, whether it is desirable that minimum wages should be fixed in regard to a particular trade or industry which is not already included in the list. We do not think that in enacting section 27 the legislature has in any way stripped itself of its essential powers or assigned to the administrative authority any thing but an accessory or subordinate power which was deemed necessary to carry put the purpose and the policy of the Act."

2. *State of Bombay v. Narothamdas*, (1950-51) C.C. 292 : (1951) S.C.R. 51.

2a. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

2. The Legislature may authorise the Executive to apply to a new area not only the whole of an existing Act but also any *part* of the Act as the Executive may consider necessary for the area in question; but the Legislature cannot authorise the Executive so to exercise its discretion to select and apply particular provisions of an Act as to constitute a change in the policy of the entire Act, in its application to that area.<sup>2b</sup>

Hence, if the Executive, in the exercise of its delegated power to apply particular part of an Act, in fact, selects only such parts as by themselves introduce a policy different from that of the Act, the order or notification of the Executive applying the parts in question must be held to be *ultra vires*.<sup>2b</sup>

#### *Illustration.*

In exercise of a statutory power to extend to an area 'any section' of a municipal Act 'subject to such restrictions and modifications as it may deem fit', the State Government extended only the charging section of the taxation provisions of the municipal Act, without extending to that area the procedural sections which gave the inhabitants a chance of being heard and to object. Under the Act, it was obligatory upon the Government to give such opportunity.

*Held*, that though the Government had the power to pick out a section of the Act and to extend such section to the area, the effect of such action in the instant case was to change the policy of the Act (in its application to the area in question), viz., to give the people a hearing before making them liable and that since such an authority could not be validly delegated by the Legislature, the Notification extending the charging section only, was *ultra vires*.<sup>2b</sup>

3. While empowering the Executive to extend an Act to a particular area, the Legislature may provide that upon such extension, the existing laws prevailing in that area shall be deemed to be repealed. It may even authorise the Executive to expressly repeal those existing laws which would otherwise have been repealed by implication. Such delegation of the power of repeal is not unconstitutional inasmuch as the repeal in such cases is in reality an act of the Legislature itself.<sup>3</sup>

#### **Delegation of ancillary matters permissible.**

Once the policy and standard are laid down by the Legislature, it is permissible for it to delegate *subsidiary* and *ancillary* matters to some other authority even though such delegation may not strictly come within the category of conditional legislation.<sup>4</sup>

#### *Illustrations.*

1. In a statute providing for payment of compensation for acquisition of estates, the Legislature had applied its mind to and prescribed the *form* in which compensation had to be paid and fixed the number of equal *instalments* in which it should be paid and also provided for payment of *interest* on the amount of compensation during payment by instalments,—but left the *proportion* in which the compensation could be paid in cash and in bonds and the *intervals* between instalments to be determined by the Executive. *Held*, it was a permissible delegation inasmuch as the determination of the last mentioned questions necessarily depended on the financial resources of the State and

2b. *Rajnarain v. Patna Administration*, (1955) 1 S.C.R. 290.

3. *Ziaullah v. State of U. P.*, A. 1955 All. 554.

4. *Edward Mills v. State of Afmer*, (1955) 1 S.C.R. 735.



the availability of funds in regard to which the Executive alone had special means of knowledge.<sup>2a</sup>

2. Entry 2 of List II, read with s. 296 (2) of the Government of India Act, 1935, empowered the Provincial Legislature to make a law relating to the constitution of a tribunal for hearing appeals in revenue cases.

S. 3 (3) of the Assam Revenue Tribunal (Transfer of Powers) Act, 1948 provides—

"Without prejudice to the foregoing provisions the authority appointed by general or special order of the Provincial Government shall exercise such jurisdiction to entertain appeals . . . as it is exercised now by the Revenue Tribunal".

It was contended that the Provincial Legislature had failed to exercise its legislative function by omitting to specify any principle or policy as to how the tribunal should be constituted and left the constitution of the tribunal entirely to the discretion of the Provincial Government without any guide. Repelling this contention, the Supreme Court held that there was no particular form of expression for constituting a tribunal and that by the above provision the Legislature had in fact 'constituted' the tribunal to consist of such persons as the Provincial Government might appoint. Only the power to select and appoint persons to man the authority constituted by the Legislature was delegated to the Government. As to the contention that the impugned provision did not lay down any principles for the guidance of the Government in making the appointment, it was observed that the fact that the tribunal was to sit in appeal over the decisions of the Excise Commissioner gave sufficient indication as to the requisite capacity and competency of the persons eligible to be appointed to the tribunal.<sup>7</sup>

#### General conditions for the validity of subordinate legislation.

(i) *Publication* is essential for the validity of subordinate legislation. In the case of Laws enacted by the Legislature, they become Acts as soon as the assent of the head of the Executive (President or Governor, as the case may be) is given to the Bill, because the deliberations of the Legislature are public and the laws are passed by the accredited representatives of the people. But this is absent in the case of rules or regulations made by some Department of the Government or other subordinate or non-sovereign law-making authority. Rules or regulations made by them can be binding on the people only after they are published and made known to the people who are to be affected by them.<sup>8</sup>

(ii) It must not be *ultra vires*. In other words,—

(a) It must not go beyond, nor be repugnant to, the statute "under which it has been made."<sup>9</sup>

5. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (266, Shastri C.J.).

6. *Suryapal v. State of U. P.*, (1952-4) 2 C.C. 396 (401) : (1952) S.C.R. 1056.

7. *State of Assam v. Kidwai*, (1957) S.C.R. 295 (317-9). [It is submitted that the argument that the very fact that the tribunal was to sit in appeal over the decisions of the Excise Commissioner indicated the qualifications etc. of the persons to be appointed is somewhat weak. The question is whether the Legislature had done its duty. If it is conceded that in order to constitute a tribunal, the principles laying down the qualifications of the members is an essential function, did the Legislature perform that part in the instant case? It may be expected that this decision will be explained in some later decision].

8. *Harla v. State of Rajasthan*, (1952) S.C.R. 110.

9. *Kama Umi v. Rama*, (1952) 2 M.L.J. 167.

*Illustration.*

S. 49 (4) authorises the Government to frame rules for the constitution of special benches "for determining dispute between parties of different circles or Gaon Sabhas or for any other purpose." "Circles or Gaon Sabhas," obviously refer to circles and Gaon Sabhas constituted under the Act. Hence, the above provision does not authorise the framing of a rule in so far as it relates to a person belonging to a place outside the State. Nor can the phrase "for any other purpose" in sub-s. (4) of S. 49, whatever that may mean be construed so widely as to authorise a rule affecting such an outsider. Hence, Rule 84 in so far as it relates to the constitution of a special bench where one of the parties belong to a place outside the State is '*ultra vires*'."<sup>10</sup>

2. When rule-making power is conferred by the statute in general terms "for the purposes of carrying out the provisions of the Act", the purposes of the Act must be determined with reference to all the provisions of the Act read together,<sup>11</sup> before holding any particular rule to be *intra vires*.

*Illustration.*

S. 27 (1) of the Bombay Agricultural Produce Markets Act, 1939 empowered the Market Committee to make bye-laws "for the regulation of the business and the conditions of trading" in the market area, "*subject to the rules made by the Provincial Government under s. 26*". The Provincial Government made r. 65, prohibiting any person from doing business in the market area without obtaining a licence from the Market Committee. Held, that r. 27 (1) suggested that the Provincial Government also, under its general rule-making power under s. 26, had the power to make rules for the regulation of business in the market area and the impugned rule was made by the Government for the purpose of facilitating the Market Committee to function effectively under s. 27 of the Act. Hence, the rule could not be held to be *ultra vires*.<sup>12</sup>

3. S. 4 (1) of the Orissa Sales Tax Act, 1947 which came into force in April, 1947, provides—

"... With effect from such date as the Provincial Government may, by notification in the Gazette, appoint, ... every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000/- shall be liable to pay tax ..."

In exercise of the power conferred by the above provision, the Government of Orissa issued the following notification, on March 1, 1949:

"... the Government of Orissa are pleased to appoint the 31st March, 1949, as the date from which every dealer whose gross turnover during the year ended the 31st March, 1949, exceeded Rs. 5,000/- shall be liable to pay tax, ..."

Held, that the notification was *intra vires* in so far as it fixed a date, but was *ultra vires* in so far as it prescribed the period of one year ending in March, 1949 as the relevant period of turnover instead of the year preceding the commencement of the Act, as specified in s. 4 (1) of the Act.<sup>12</sup>

(b) It must be made and published in the manner prescribed by the statute under which it is made. Thus, if it is not published in

10. *Bhim Sen v. State of U. P.*, A. 1955 S.C. 435 (438).

11. *Cf. Chitmanlal v. State of Bombay*, A. 1960 S.C. 96.

12. *S. T. O. v. Patel & Co.*, (1959) S.C.R. 520.



the Official Gazette<sup>14</sup> or laid before Parliament<sup>15</sup> as required by the statute, the rule or regulation must be void.

(iii) Subordinate legislation cannot be given retrospective effect unless the statute expressly confers such power upon the rule-making authority<sup>16</sup>.

(iv) No tax can be imposed by any bye-law, rule or regulation, unless the statute under which the subordinate legislation is made specifically authorises the imposition.<sup>17, 18</sup>

See, further, under Art. 265, *post*.

(v) The rule or regulation must not violate any provision of the Constitution. Thus, a rule which imposes an 'unreasonable restriction' (whether substantially or procedurally) upon a fundamental right guaranteed by Art. 19, will be void.<sup>19</sup>

### Power to validate *ultra vires* subordinate legislation.

When a statutory instrument is *ultra vires* (as distinguished from 'unconstitutional') the powers conferred by the statute, it is competent for the Legislature to validate such instrument even with retrospective effect.<sup>20</sup>

The reason is—if the Legislature is competent to legislate on the subject, it can exercise that power either directly or by way of validating the *ultra vires* rule or notification which was not covered by its previous delegation.<sup>21</sup>

The principle applies to the validation of any executive order relating to a subject within the competence of the Legislature.<sup>22</sup>

### Some Aspects of Legislative Power in General.

It is clear from the foregoing discussions that both the Union Parliament and the State Legislatures have within their constitutional limits, plenary powers of legislation like any other sovereign Legislature. Hence, either Legislature shall have the power to exercise its legislative authority in the following ways, *inter alia*,—

(i) It may legislate either absolutely or conditionally,—in the latter case leaving to the discretion of some external authority the *time* and *manner* of carrying its legislation into effect, as also the *area* over which it is to extend.

(ii) It may authorise subordinate bodies to make bye-laws or regulations under the statute, for its detailed administration (see p. 464, *ante*).

(iii) It can make either a permanent or a temporary Act.

(iv) Where the Constitution empowers a Legislature to make laws with respect to a particular subject, *generally*, the Legislature is entitled to legislate with respect to a part of the subject covered by the entry, leaving the other part outside its legislation.<sup>23</sup>

(v) It may legislate either prospectively or retrospectively.

(vi) The power of a Legislature to repeal, modify or alter laws is, as a rule, co-extensive with its powers of direct legislation. It can not only amend or repeal earlier statutes, but may also modify or over-

13. *Narendra Kumar v. Union of India*, A. 1960 S.C. 430.

14. *Bugga v. Murhar*, A. 1956 Hyd. 35 (38).

15. *Narayana v. State of T. C.*, A. 1954 T.C. 504 (506).

16. *K. K. Samaj v. Nagpur Corpn.*, A. 1956 Nag. 152.

17. *Maheshwari Prasad v. State of U. P.*, A. 1957 All. 282.

18. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

19. *Biri Works v. S. T. O.*, A. 1959 All. 208 (211).

20. *United Provinces v. Atiga*, A. 1941 F.C. 16 (26).

21. *Hulas Narain v. Province of Bihar*, (1942) 46 C.W.N. (F.R.) 21.

ride the common law or judicial decisions<sup>22</sup> relating to subjects which are within its legislative competence.

(vii) It may legislate by 'reference' or 'incorporation'. Where there are provisions relating to a particular subject already embodied in some previous enactment, the Legislature, instead of repeating those provisions in the subsequent Act, may simply refer to those provisions. In such a case, those provisions are to be read as if they are enacted in the subsequent Act for the first time.<sup>23</sup>

One peculiar result of legislation by reference is that the repeal of the original Act does not repeal such portions of it as have been incorporated into another Act. In other words, the incorporated sections still operate in the later Act, even though the Act in which the sections were originally enacted no longer exists.<sup>24</sup>

(viii) The validity of a legislation depends upon whether the Legislature concerned has any power under the Constitution to enact it, it is immaterial whether the Legislature omits to specify the power or mentions a wrong authority.<sup>25</sup>

(ix) It may validate an unlawful executive act,<sup>1</sup> including an unauthorised assessment of tax,<sup>2</sup> or *ultra vires* or unauthorised subordinate legislation such as Rules.<sup>3</sup>

### 'Subject to the provisions of this Constitution'.

1. These words indicate that the object of Art. 245 (1) is only to distribute the legislative powers between the Union and the State Legislatures and not to exempt them from any of the limitations which are imposed by the other provisions of the Constitution upon legislative powers. These limitations are—

(i) The fundamental rights guaranteed by Part III of the Constitution,<sup>4</sup> even where the legislation is undertaken in pursuance of a Directive Principle.<sup>5</sup>

(ii) The limitation imposed by the Entries in the Legislative Lists in the Seventh Schedule as to the subject-matters on which the Union or the State Legislature may legislate.<sup>6</sup>

(iii) Other mandatory provisions of the Constitution which impose limitations upon the powers of the Legislatures, e.g., Arts. 286,<sup>7</sup> 301,<sup>8</sup> 303-4.<sup>9</sup>

(iv) In the case of State legislation, there are further limitations, viz., that (a) its operation cannot extend beyond the boundaries of the State, in the absence of a territorial nexus; (b) it must be for the purposes of the State.<sup>10</sup>

(v) What a Legislature cannot do directly, it cannot do indirectly. Hence, if a matter is beyond the legislative competence of a State Legis-

22. *Viswanathan v. Kanaran*, A. 1956 Mad. 604 (605).

23. *Shamrao v. Dt. Magistrate*, (1952) S.C.A. 635 (640).

24. *Secy. of State v. Hindusthan Co-operative Ins.*, (1931) 35 C.W.N. 794 P.C.

25. *Ahmed v. Inspector*, A. 1959 Mad. 261 (266).

1. *United Provinces v. Atiqua*, A. 1941 F.C. 16.

2. *Sundararajan v. State*, A. 1956 Mad. 298 (300).

3. *Mukandl v. Executive Engineer*, A. 1956 Pepsu 40 (44).

4. *R. M. D. C. v. Union of India*, (1957) S.C.A. 912 (922).

5. *Behram v. State of Bombay*, A. 1955 S.C. 123 (145).

6. *Cf. State of Bombay v. United Motors*, (1953) S.C.R. 1069.

7. *Kerala Education Bill*, in re, A. 1958 S.C. 956 (966).

8. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj. 114 (119) [contra *Barna v. State of Assam*, A. 1955 Assam, 249].

9. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699.

10. *D. T. Co. v. State of Bihar*, A. 1956 Pat. 178 (180).



lature (being outside Lists II and III), it cannot legislate on that subject by way of 'adopting' a law made by another Legislature.<sup>11</sup>

2. On the other hand, the powers of the Legislature cannot be fettered by anything outside the Constitution, such as an obligation undertaken by the Government,<sup>12</sup> or a Crown grant.<sup>13</sup>

### Presumption that a Legislature is acting within its competence.

In construing an enactment of a Legislature with limited competence, the Court must presume that the Legislature in question knows its limits and that it is only legislating for those who are actually within its jurisdiction,<sup>14</sup> and the enactment should, therefore, receive, if possible, such interpretation as will make it operative and not impetative.<sup>15</sup>

It is only where there are clear and unequivocal words in the statute which goes to show that the Legislature has travelled outside the limitations laid down in the Constitution that the Court will pronounce the statute to be *ultra vires*.<sup>16</sup>

### The Doctrine of Colourable Legislation.

1. This doctrine means that if the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature is passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.<sup>17</sup>

2. In order to determine the true nature of a legislation impeached as colourable,—

(i) The Court must look to the *substance* and not merely the *form* of the Act.

"Where the law-making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is it that the Legislature is really doing."

For the purpose of investigating the substance of an enactment, the Court will examine two things—(a) effect of the legislation and (b) object or purposes of the Act.<sup>18</sup>

(ii) On the other hand, it should be clearly understood that the doctrine against colourable legislation has nothing to do with the *motive* of the legislation; it is in essence a question of *vires* or power of the Legislature to enact the law in question.<sup>19</sup>

11. *Durgeshwar v. Bar Connell*, A. 1954 All. 728.

12. *Umegh Singh v. State of Bombay*, A. 1955 S.C. 540 (547).

13. *All Mirza v. State of Bihar*, A. 1957 Pat. 390 (392).

14. *State of Bihar v. Charuslla*, A. 1959 S.C. 1002 (1010).

15. *Chamarbaugwalla v. Union of India*, (1957) S.C.R., 930.

16. *K. C. G. Narayana Deo v. State of Orissa*, A. 1954 S.C. 375 (379); (1954) S.C.R. 1.

3. Thus, the Court has to examine the object of the legislation for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the Legislature to exercise its powers.<sup>18</sup> If the Legislature is competent to make a particular law, its motive<sup>17</sup> in enacting it or the fact that it would operate harshly on some persons,<sup>19</sup> is irrelevant.

4. To unravel a plan of fraud on powers, it may be necessary to scrutinize all the documents which help to ascertain the truth. It may thus be necessary to look into another Act to ascertain the pith and substance of the impugned Act.<sup>18</sup>

5. The doctrine of colourable legislation has no application where the powers of a Legislature are not fettered by any constitutional limitations.

<sup>20</sup>**246.** (1) Notwithstanding anything in clauses (2) and (3),

Subject-matter of laws made by Parliament and by the Legislatures of States.

Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State . . . .<sup>21</sup> also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of a State . . . .<sup>21</sup> has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State<sup>21</sup> notwithstanding that such matter is a matter enumerated in the State List.

#### **Art. 246: Distribution of legislative powers.**

This Article deals with the distribution of legislative powers as between the Union and the State Legislatures, with reference to the different Lists in the 7th Sch. The gist of the Article, in short, is that the Union Parliament has full and exclusive power to legislate with respect to matters in List I and has also power to legislate with respect

17. *Nageswara v. Andhra Pradesh Transport Corpn.*, A. 1959 S.C. 308 (316); *State of V. P. v. Moradhwaj*, A. 1960 S.C. 796.

18. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (947).

19. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124 (1138).

19a. *Sarwarlal v. State of Hyderabad*, A. 1960 S.C. 862.

20. In its application to the State of Jammu and Kashmir, in article 246, the words, brackets and figures "Notwithstanding anything in clauses (2) and (3)" occurring in clause (1), and clauses (2), (3) and (4) shall be omitted.

21. The words 'specified . . . Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.



to matters in List III. The State Legislature, on the other hand, has exclusive power to legislate with respect to matters in List II, *minus* matters falling in Lists I and III and has concurrent power with respect to matters included in List III.<sup>22</sup>

### Distribution not retrospective.

The distribution of legislative powers made by the present article, read with the Entries in the Legislative Lists in the Seventh Schedule, is not retrospective<sup>23</sup> so as to affect the validity of laws in force at the commencement of the Constitution. They will continue to be in force by virtue of Art. 372, until repealed by the competent Legislature, even though the Legislature which enacted the pre-Constitution law would not have the power to legislate with respect to the subject under the scheme of distribution of legislative powers under the Constitution.<sup>24</sup>

### Effects of a law being *ultra vires*.

1. The legislative powers of the Legislatures of the Union and the States being limited by the provisions relating to distribution of powers and other mandatory limitations<sup>25</sup> imposed by different provisions of the Constitution, a law passed without legislative competence is a nullity *ab initio*<sup>1</sup> and nothing can be done to cure that law.<sup>2</sup> Even a subsequent amendment of the Constitution cannot confer jurisdiction upon the Legislature with retrospective effect, so as to validate that law.<sup>3</sup>

2. While in the case of contravention of a fundamental right, the impugned law is not wiped out from the statute-book altogether but, as a result of the declaration of its unconstitutionality, it ceases to stand in the way of those who are entitled to exercise the fundamental right in question<sup>4</sup> (see p. 27, *ante*),—in the case of want of legislative competence the law is rendered a nullity for want of jurisdiction.

The above view, as regards contravention of fundamental rights, has been departed from by the majority of the Supreme Court (3 to 2) in the recent case of *Deep Chand v. State of U. P.*,<sup>4a</sup> where it has been held that while the view taken in *Bhikaji's case*<sup>5</sup> (see p. 23, *ante*) may be correct as regards pre-Constitution laws, which cannot be said to have been void *ab initio* for contravention of fundamental rights since no such rights were in existence when such laws were made,—the situation is obviously different as regards post-Constitution laws which are void *ab initio*, by reason of Art. 13 (2), in case they violate any of the rights included in Part III of the Constitution. Art. 13 (2), according to this view, operates as a limitation on the legislative competence of the Legislature concerned, in the same way as the Lists in the 7th Sch. do; whether a person is a citizen or not may be relevant for the purpose of enforcement of a fundamental right but it cannot be used for the purpose of retaining on the statute book an enactment which was void *ab initio* or for the purpose of revivifying it by a subsequent constitutional amendment of the fundamental right in question.

22. *Subramaniam v. Mutluswami*, A. 1941 F.C. 47.

23. *Shenasankar v. State of M.P.*, A. 1951 Nag. 58 (F.B.).

24. *Radhe Lal v. Ladli*, A. 1957 Panj. 90 (92).

25. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj. 114 (119) F.B.

1. *R. M. D. C. v. Union of India*, A. 1957 S.C. 628 (633).

2. Cf. *Readymoney v. State of Bombay*, A. 1958 Bom. 181 (187).

3. *Veeranath v. State of Hyderabad*, A. 1957 A.P. 1039.

4. *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 589 (599).

4a. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648.

**Whether an ultra vires law can be validated by the competent Legislature.**

It would appear from the Supreme Court decision in *Sundararamier v. State of A. P.*,<sup>5</sup> that it is competent for a Legislature which is entitled to legislate with respect to a subject, to validate, with retrospective effect a law (relating to that subject) passed by another Legislature which was not competent to make such law.

**Power of competent Legislature to adopt law made by another Legislature.**

1. A Legislature, in exercise of its legislative power with respect to its subject may, instead of enacting a measure of its own, extend to its own territory a law made by another Legislature. Thus, Parliament is competent to extend a law made by a State to a Union Territory.<sup>6</sup> Similarly, it is competent for a State Legislature to adopt and incorporate an Act made by another State Legislature, relating to a subject with respect to which it has legislative power.<sup>7</sup>

2. When a law is thus extended, it becomes an Act of the extending Legislature itself, by incorporation.<sup>8</sup>

**'Notwithstanding anything in cls. (2) and (3)'.**

1. These words lay down the principle of federal supremacy, viz., that in case of inevitable conflict between Union and State of powers the Union powers as enumerated in List I shall prevail over the State powers as enumerated in Lists II and III, and in case of overlapping between Lists III and II, the former shall prevail.<sup>9,10</sup>

2. But the principle of federal supremacy laid down in Art. 246 (1) of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between Entries in the Union and State Lists. In the case of a seeming conflict between Entries in the two Lists, the entries should be read together, without giving a narrow or restricted sense to either of them. *Secondly*, an attempt should be made to see whether the two Entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation cannot be effected by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The *non-obstante* clause in Art. 246 (1) shall operate only if such reconciliation should prove impossible.<sup>11</sup> *Thirdly*, no question of conflict between two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' (see under Sch. VII, *post*) appears to fall exclusively under one List, and the encroachment upon another List is only incidental.<sup>12</sup>

**'With respect to'.**

It is in view of this expression that the doctrine of 'pith and substance' has been applied in the interpretation of the legislative

5. *Sundararamier v. State of A. P.*, (1956) S.C.R. 1422 (1463).

6. *Mithan Lal v. State of Delhi*, A. 1958 S.C. 682 (685-6).

7. *Bhudan v. State*, A. 1959 A.P. 237 (240).

8. *Subramanyam v. Multuswami*, A. 1941 F.C. 47.

9. *Thangla v. Hanuman Bank*, A. 1958 Mad. 403 (409).

10. *State of Bombay v. Balsara*, (1951) S.C.R. (1950-51) C.C. 308 (311); *G. G. In Council v. Prov. of Madras*, A. 1945 P.C. 98.



powers of the Legislatures under the Constitution. When a question of *vires* of any enactment is raised, it is to be seen whether, looking at the legislation as a whole, it can be said to be a legislation *substantially* with respect to any of the Entries in the List.<sup>11</sup> Once it is held that it does, the legislative power conferred by that Entry will extend to all *ancillary* or *subsidiary* matters which may fairly and reasonably be said to be comprehended in that topic of legislation.<sup>12</sup>

[See, further, under the Seventh Schedule].

**Cl. (3) : 'For such State'.**

See "Extent of State Legislation" at p. 452, *ante*.

**Cl. (4) Power of Parliament in regard to Union Territories.**

The effect of the present clause is to relieve Parliament of the limitations imposed upon its power by cls. (2) and (3), so far as Union Territories are concerned. It is, accordingly, competent to make laws with respect to subjects included in the State List, to have application to Union Territories.<sup>13</sup> According to the Supreme Court, in the exercise of this power, Parliament is not fettered by anything in the Entries in the State List or anything following therefrom.<sup>14</sup>

**247. Notwithstanding anything in this Chapter, Parlia-**

ment to provide for the establishment of certain additional courts.

ment may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.

**<sup>14</sup>248. (1) Parliament has exclusive power to make any law with respect to any matter not**

Residuary powers of legislation.

enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

**Art. 248: Residuary power of legislation.**

1. Notwithstanding the great care with which the various Entries in the three Lists of our Constitution have been framed, there may be some legislative or taxing power which does not come under any of these Entries. In such a case, it is the Union Parliament which shall have power to legislate with regard to such matter or taxation, by virtue of the present Article. Resort to this residual power should, however, be a matter of 'last refuge',—only when all the Entries in the three Lists are *absolutely exhausted*.<sup>15</sup> This does not mean, however, that in order to avoid falling back upon the residual power, the Court would be justified in straining the language of any of the Entries or to render the residuary Entry altogether meaningless.<sup>16</sup>

11. *Subramaniam v. Mutluswamy*, A. 1941 F.C. 47.

12. *United Provinces v. Aliqua*, A. 1941 F.C. 16 (25).

13. Cf. *Mithan Lal v. State of Delhi*, A. 1958 S.C. 682 (685).

14. Not applicable to the State of Jammu and Kashmir.

15. *Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 115 (118).

2. This Article applies to the Union *vis à vis* the States. So far as the Union Territories are concerned, the relevant provision is Art. 246 (4).<sup>16</sup>

3. As instances of laws passed under the residuary power may be mentioned—the Himachal Pradesh Assembly (Constitution & Proceedings) Validation Act, 1958.<sup>17</sup>

<sup>18</sup>**249.** (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein :

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have, effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

**Art. 249: Power of Parliament to legislate with respect to a State subject, in the 'national interest'.**

The present Article of our Constitution empowers the Union Parliament to take up for legislation by itself *any matter* which is specially enumerated in List II, whenever the Council of States resolves, by a 2/3 majority, that such legislation is 'necessary or expedient in the national interest'. In other words, whenever any such resolution is passed, Art. 246 (3) will cease to be a fetter on the power of the Union Parliament, to the extent that the resolution goes. This power is to be distinguished from that conferred by Art. 250, for under the present Article no emergency is necessary for the assumption of the State power by parliament. 'National interest' is wide enough to cover any matter which has incidence over the country as a whole as distinguished from any particular locality or section of the people.<sup>19</sup>

16. *Mithan Lal v. State of Delhi*, A. 1958 S.C. 682 (685).

17. *Jadab v. H. P. Administration*, (1960) S.C.J. 17n.

18. Not applicable to the State of Jammu and Kashmir.

19. See, further, C3, Vol. II, p. 281.



**250.** (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

**251.** Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States.

**252.** (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that be-

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

20. In its application to the State of Jammu and Kashmir in article 250, for the words "to any of the matters enumerated in the State List", the words "also to matters not enumerated in the Union List" shall be substituted.

21. In its application to the State of Jammu and Kashmir, in article 251, for the words and figures, "articles 249 and 250," the word and figures "article 250" shall be substituted, and the words "under this Constitution" shall be omitted; and, for the words "under either of the said articles", the words "under the said article" shall be substituted.

half by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

**Art. 252: Power of Parliament to legislate for States\* by consent.**

1. There are many subjects in the State List, e.g., public health, agriculture, forests, fisheries, which would require common legislation for two or more States. So, this Article makes it possible for Parliament to make such laws relating to State subjects, as regards such States whose Legislatures empower Parliament in this behalf by resolutions.

2. Even after the enactment of an Act by Parliament under this Article, it is open to any of the other States to adopt the Act for such State by merely passing a resolution to that effect in its Legislature. But the operation of the Act in such State cannot be from any date earlier than the date of the resolution passed in its Legislature adopting the Act.<sup>23</sup>

<sup>24</sup>**253.** Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

**Art. 253: Legislation for giving effect to international agreements.**

This Article is in conformity with the object declared by Art. 51 (c), p. 201, *ante*. Treaty-making, implementing of treaties, etc., is a subject of Union legislation, under Art. 14, List I, *post*. But it would have been difficult for the Union to implement its obligations under treaties or other international agreements if it were not able to legislate with respect to *State subjects* in so far as that may be necessary for that purpose. Hence, this Article, by the words 'notwithstanding the foregoing provisions', empowers the Union Parliament to invade List II, in so far as that may be necessary for the purpose of implementing the treaty obligations of India.

**'Notwithstanding anything in the foregoing provision of this Chapter'.**

These words mean that the distribution of legislative powers between the Union and States shall not restrict the power of Parliament to make

23. *Venkataraman v. Controller of Estate Duty*, A. 1960 Mal. 305 (308).

24. In its application to the State of Jammu and Kashmir, to article 253, the following proviso shall be added:—

"Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State."



laws under Art. 253; in other words, Parliament shall be competent to legislate on matters included in List II, in so far as the same may be necessary for the implementation of treaties or agreements. But other provisions of the Constitution, such as the Fundamental Rights, cannot be violated in making such laws.<sup>22</sup>

**254.** (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State<sup>23</sup> . . . . with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

#### Scope of Art. 254.

Cl. (1) lays down a general rule. Cl. (2) is an exception to Cl. (1) and the Proviso qualifies that exception.<sup>24</sup>

#### Cl. (1) : Union law to prevail where State law is repugnant to it.

The question of repugnancy arises in connection with the subjects enumerated in the Concurrent List<sup>25</sup> (List III of the 7th Sch.) as

25. *Ajab Singh v. State of Punjab*, A. 1952 Panj. 309 (321) [reversed on other points, by *State of Punjab v. Ajab Singh*, A. 1953 S.C. 664].

1. In its application to the State of Jammu and Kashmir, in article 254, the words, brackets and figure "or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2)" and the words "or as the case may be, the existing law" occurring in clause (1) and the whole of clause (2) shall be omitted.

2. The words 'specified . . . Schedule' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

3. *Deep Chand v. State of U.P.*, A. 1959 S.C. 648.

4. *Megh Raj v. Alla Rakha*, A. 1947 P.C. 72; *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799 : (1952-4) 2 C.C. 523 (526).

regards which both the Union and the State Legislatures have concurrent powers, so that the question of conflict between laws made by both Legislatures relating to the same subject necessarily arises.

Cl. (1) says that if a State law relating to a 'Concurrent subject'<sup>5</sup> is 'repugnant' to a Union law relating to the subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void.

The following points should be noted in this connection :

1. The State law does not become void as soon as the Union Parliament legislates with respect to the same subject. There is nothing to prevent the State Legislature to legislate with respect to a Concurrent subject merely because there is a Union law relating to the same subject. Art. 254 (7) is attracted only if the State law is 'repugnant' to the Union Act,<sup>6</sup> which means that the two cannot stand together.<sup>7</sup> The doctrine of 'occupied field' has no application in the interpretation of the present article.<sup>8</sup>

2. There is no question of applying Art. 254, unless the State law is, in its 'pith and substance' a law relating to the Concurrent List. If it is covered by an Entry in the State List, but only touches the Concurrent List incidentally, there is no application of Art. 254.<sup>9</sup>

#### Illustrations.

(i) The Madras Prohibition Act is both in form and substance a law relating to intoxicating liquors, falling within Entry 31 of the Provincial List of the Government of India Act, 1935. The presumptions in s. 4 (2) are not presumptions which are to be raised in the trial of all criminal cases, as those enacted in the Evidence Act. They are to be raised only in the trial of offences under s. 4 (1) of the Act. They are therefore purely ancillary to the exercise of the legislative power in respect of Entry 31 in List II. So also, the provisions relating to search, seizure and arrest in ss. 28 to 32 are only with reference to offences committed or suspected to have been committed under the Act. They have no operation generally or to offences which fall outside the Act and are therefore ancillary to the legislation. The Madras Prohibition Act is thus in its entirety a law within the exclusive competence of the Provincial Legislature, and the question of repugnancy under s. 107 (1) does not arise.<sup>10</sup> The provisions in question do not relate to the Concurrent power relating to Evidence and Criminal Procedure.<sup>11</sup>

(ii) A State law relating to sales tax under Entry 54 of List II is not invalid on the mere ground that the definition of 'sale' in the State Act is in conflict with the definition of that word in the Sale of Goods Act, 1930. No question of 'repugnancy' arises in this case because the State law is a law not relating to 'sale of goods' (Entry 7 of List III), but a law relating to 'tax on the sale of goods' which is a matter within the exclusive competence of the State Legislature under Entry 54 of List II. The only question that can arise with reference to such a law is whether it is within the purview of that entry.<sup>12</sup>

3. The onus of showing the 'repugnancy' and the extent thereof is on the party who attacks the validity of the State law.<sup>13</sup>

5. *Lakshmarayan v. Prov. of Bihar*, A. 1950 F.C. 59.

6. *Zaverbhai v. State of Bombay*, A. 1954 S.C. 752.

7. *Shyamkant v. Rambhajan*, A. 1939 F.C. 74 (83).

8. *Megh Raj v. Alla Rakhia*, A. 1947 P.C. 72.

9. *Krishna v. State of Madras*, A. 1957 S.C. 297 (303).

10. *State of Madras v. Dunkerley*, A. 1958 S.C. 560 (575).

11. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.



**'Repugnancy'.**

A State law may be 'repugnant' in any of the following ways—

(i) When there is direct conflict between the two provisions. This may happen—

(a) Where one cannot be obeyed without disobeying the other.

(b) Two enactments may also be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes do more than impose duties; they may, for instance, confer *rights*; and one statute is inconsistent with another when it *takes away a right* conferred by the other even though the right be one which might be *waived or abandoned* without disobeying the statute which conferred the right.<sup>12</sup> In other words, repugnancy is not confined only, to the case where there is a direct conflict between two Legislatures, e.g., where the one says 'do' what the other says 'don't'. It may also arise where both laws operate in the same field and the two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed, in all such cases, the law made by Parliament shall prevail over a State law, under Art. 254 (2). The principle of implied repeal may be applied to determine repugnancy for the purposes of Art. 254 (2).<sup>13</sup>

(ii) Though there may not be any direct conflict between the Union and the State legislation, where it is evident that the Union Parliament intended its legislation to be a complete and *exhaustive* code relating to the subject, it shall be taken that the Union law has replaced State legislation relating to the subject.<sup>14</sup>

But if the Union law itself permits or recognises other laws restricting or qualifying the general provision made in it, the special provisions of such State local law cannot be said to be repugnant to the Union law,<sup>15</sup> for instance, where the Central Act applies only where there is 'no local law to the contrary'.<sup>16</sup>

(iii) No question of repugnancy arises unless the law made by Parliament and the law made by the State Legislature occupy the same field.<sup>17</sup> If they deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise.<sup>18</sup>

**Illustration.**

1. The U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 provided for a "rational distribution of sugarcane to factories, for its development on organised scientific lines, to protect the interests of the cane growers. . . ."

By enacting the Industries (Development and Regulation) Act (LXV of 1951), Parliament declared the industry engaged in the manufacture or production of sugar as one of the industries the control of the Union over which was expedient in the public interest. By the Amendment Act XXVI of 1953, Parliament inserted s. 18G in the Act empowering the Central Government to make orders for regulating the supply and distribution of "any article or class of articles *relatable* to any scheduled industry", and the expression was explained as including "any article

12. *Mangtula v. Radhashayam*, A. 1953 Pat. 14 (22).

13. *Zaverbhal v. State of Bombay*, (1955) 1 S.C.R. 799 : (1952-4) C.C. 523.

14. *Megh Raj v. Alla Rakha*, (1942) 46 C.W.N. (F.R.) 61; *State of V. P. v. Moradhwaj*, A. 1960 S.C. 796 (800).

15. *Hamid v. Aresh*, A. 1956 Hyd. 10 (12).

16. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648.

17. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.

or class of articles imported into India which is of the same nature or description as the article or class of articles *manufactured or produced* in the scheduled industry".

The question was whether the U. P. Act of 1952 became repugnant to the Central Act after the amendment of 1953. *Held*, that the expression 'articles relatable to a scheduled industry' comprised only those *finished products* which were of the same nature or description as the article or class of articles manufactured or produced in the scheduled industry and *did not comprise the raw materials for the scheduled industry*. Hence, the field of sugarcane was not covered by the Central Act, as amended in 1953 and the legislative powers of the State Legislature in regard to sugarcane was not affected by it in any manner whatever and that, accordingly, there was no repugnancy at all between the Central Act and the impugned State Act.<sup>18</sup>

2. Where the two Acts prescribe two different revising authorities but it is possible for them to co-exist, there is no repugnancy.<sup>19,20</sup> Similarly, there is no repugnance where the State law prescribes *additional disqualification*<sup>21</sup> or additional rules of evidence,<sup>22</sup> provided the Central Act was not intended to be exhaustive.

(iv) The repugnancy which is alleged must exist *in fact* and not depend merely on a *possibility*.<sup>23</sup> This is illustrated by the observations of Bhagwati J. in *Tika Ramji v. State of U. P.*<sup>18</sup>

"Even assuming that sugarcane was an article or class of articles relatable to the sugar industry within the meaning of section 18-G of Act LXV of 1951, it is to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that section and no question of repugnancy could ever arise because, as has been noted above, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order under section 18-G being issued by the Central Government would not be enough. The existence of such an order would be the essential prerequisite before any repugnancy could ever arise."<sup>24</sup>

(v) When a question of repugnancy arises under Art. 254, every effort should be made to reconcile the two enactments and to construe them so as to avoid their being repugnant to each other and care should be taken to see whether the two really operate in different fields without encroachment.<sup>25</sup>

There is no repugnancy unless the two Acts are wholly incompatible with each other or the two together would lead to absurd results.<sup>26</sup>

#### 'Law made by the Legislature of a State'.

1. The above words in both cls. (1) and (2) of Art. 254 refer to post-Constitution laws made by a State Legislature, and, that, accordingly, neither clause has any application to pre-Constitution Provincial laws.<sup>27</sup>

2. From the above, it has been concluded by the Madhya Bharat High Court<sup>1</sup> that the Madhya Bharat Act of 1949 could not be repealed or overridden by the Central Act 48 of 1950 which extended the Industrial Disputes Act, 1947 to the State of M. B.<sup>1</sup>

18. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.

19. *Ambala S. T. Co-op. Society v. State of Punjab*, A. 1959 Punj.

1 (7) F.B.

20. *C. W. M. S. v. S. T. A. Tribunal*, A. 1958 Ker. 19.

21. *Bramadathan v. Cochin Devaswom Bd.*, A. 1956 T.C. 19.

22. *In re Krishna*, A. 1954 Mad. 993.

23. *Shyamakant v. Rambhajan*, (1939) F.C.R. 188 (212).

24. *Om Prakash v. State*, (1957) S.C.R. 423; A. 1957 S.C. 458.

25. *Callex v. Director*, A. 1960 Cal. 219 (222).

1. *Janardan v. Hukumchand Mills*, A. 1956 M.B. 199 (204).



This decision,<sup>2</sup> however, runs counter to that of the Supreme Court in *Zaverbhai v. State of Bombay*,<sup>3</sup> where the Court held that Art. 36 of 1947 of the Bombay Legislature was impliedly repealed by the Essential Supplies (Temporary Powers) Amendment Act (LII of 1950) enacted by Parliament.

In view of the Supreme Court decision,<sup>2</sup> the view taken in the *Madhya Bharat* case<sup>4</sup> cannot be accepted as sound. The High Court, it is submitted, overlooked the provisions of s. 107 of the Government of India Act, 1935, which have been relied upon by the Supreme Court. The Provincial law, when it was enacted, was subject to s. 107 (1) of the Government of India Act, 1935, which provided that a federal law passed even subsequently, relating to the same matter, would prevail. The repeal of the Government of India Act by Art. 395 could not release the Provincial Legislature from that disability, with retrospective effect.

3. But the operation of s. 107 of the Government of India Act, 1935 was, according to two of the Judges in *Subrahmanyam v. Muttuswami*<sup>5</sup>, confined to Central Acts made *after* the commencement of the Government of India Act, 1935, so that if the Central Act was passed prior to 1-4-37, it could not hit a Provincial law on the ground of repugnancy.<sup>6a</sup>

4. It should be noted, in this connection, that the words 'Provincial law' in s. 107(1) of the Government Act, 1935, meant a law made by a Provincial Legislature constituted under that Act, that is to say, a Provincial law enacted after 1-4-37.<sup>6</sup>

#### 'Law made by Parliament'.

It means a post-Constitution Central law.

#### 'Which Parliament is competent to enact . . .'

1. Cl. (1) speaks of a State law being repugnant to (a) a law made by a Parliament or (b) an existing law. A controversy has arisen whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (a) and (b) or (b) alone.

(A) It has been suggested<sup>7</sup> that the repugnancy between a State law and a law made by Parliament may take place outside the Concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as List I. According to this view, art. 254 (1) shall apply to make a Union law made under List I prevail if a State law made under List III is repugnant to it.

(B) The above view is not acceptable for reasons more than one—

(i) As explained at p. 290 of Vol. 2, Third Edition, of the *Author's Commentary*,—the question of 'repugnancy' arises only when both Legislatures are competent to legislate in the same field.<sup>8</sup> Hence, art. 254 (1) can possibly apply only when both the Union and the

2. *Janardan v. Hukumchand Mills*, A. 1956 M.B. 199 (204).

3. *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799 [see p. 488, post].

4. *Subrahmanyam v. Muttuswami*, A 1941 F.C. 47 [Sulaiman & Varadachariar J.J.].

4a. *Caltex v. Director*, A. 1960 Cal. 219.

5. *Ramachandra v. Dt. Board*, A. 1951 Orissa 1 (6).

6. A.I.R. Commentaries on the Constitution of India, Vol. 3, Note 12 to art. 254, relying on observations in *Sadanand v. Aman*, A. 1939 Pat. 55.

State Laws relate to a subject specified in the Concurrent List, and they occupy the same field.<sup>7</sup>

(ii) It is now settled that whenever the validity of a law is challenged whether on the ground that it is *ultra vires* or repugnant to a paramount law, the first thing that the Court has to do is to apply the doctrine of 'pith and substance' and to determine to which entry in the Legislative Lists the impugned law relates, in its pith and substance<sup>8</sup>. Thus, if a State law is found to relate to a 'State subject' no question of repugnance to any Union law can possibly arise, because, the State Legislature has exclusive jurisdiction to enact the law, and it will prevail even if there is any conflict between any of its provisions and those of a Union law relating either to List I or List III.<sup>9</sup> The same principle will apply if a law made by a State Legislature under List III conflicts with some provision of a Union law relating to List I.

Of course, in interpreting the ambit of the Entries in the different Lists one has to remember the *non-obstante* clauses in art. 246<sup>1</sup>. But that is a different matter.

(iii) The words "subject to the provisions of clause (2)" in cl. (1) suggest that its scope is co-extensive with cl. (2), the latter being only an exception to the general rule enunciated in cl. (1).<sup>11</sup>

This view, expressed in *Bir Bikram v. Tofazzal*<sup>12</sup> and *Narayanaswami v. Inspector of Police*<sup>13</sup> and relied upon by the Author at p. 290 of Vol. 2 of the Third Edition of his Commentary, now finds support from the observations of Subba Rao J. in *Deep Chand v. State of U.P.*<sup>14</sup>

"Article 254 (1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualifies the exception. If there is repugnancy between the law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and the law made by the State shall, to the extent of such repugnancy, be void. Under cl. (2), if the Legislature of a State makes a provision repugnant to the provisions of the law made by Parliament, it would prevail if the legislation of the State received the assent of the President. Even in such a case, Parliament may subsequently either amend, vary or repeal the law made by the Legislature of a State."<sup>15</sup>

### 'Existing law'.

It has been held that in view of the definition in Art. 366 (1), 'existing law' in the present Article cannot be restricted to refer to Central laws only, but would also include Provincial laws existing at the commencement of the Constitution, relating to subjects now included in the Concurrent List.<sup>16-18</sup> Hence, if a State law relating

7. *Tilka Ramji v. State of U.P.*, (1956) S.C.R. 393.

8. *Deep Chand v. State of U.P.*, A. 1959 S.C. 648 (665).

9. *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799 (807).

10. *Krishna v. State of Madras*, A. 1957 S.C. 297.

11. *Governor-General v. Prov. of Madras*, A. 1945 P.C. 98; *In re C.P. & Berar Taxation Act*, A. 1939 P.C. 1.

12. *Bir Bikram v. Tofazzal*, A. 1942 Cal. 587.

13. *Narayanaswami v. Inspector of Police*, A. 1949 Mad. 307.

14. *In re Adilakshmi*, A. 1941 Mad. 533 F.B.

15. *Nambudripad v. C. D. Board*, A. 1956 T.C. 10 (23).

16. This view gets support from the observations in *Prem Nath v. State of J. & K.*, A. 1959 S.C. 749 (763).



to a Concurrent subject is repugnant to an existing Provincial law, the State law must be void unless it is made in accordance with the provisions of Art. 254 (2).<sup>17</sup>

### Effect of repugnancy.

The Patna High Court<sup>18</sup> has interpreted the word 'void' in the sense of 'inoperative'. This interpretation rests on the view that Art. 254 (1) does not take away the power of the State Legislature to legislate with respect to a subject in the Concurrent List, but simply invalidates the law in so far as it is 'repugnant' to a Central law relating to the same subject. Hence, when the repugnancy arises, the State law remains in abeyance but, if at any subsequent time, the repugnancy is removed for any reason (say, the repeal or expiry of the Central Act), the State law is revived.<sup>19</sup>

### Illustration.

The Bihar Mica Amendment Act, 1949 was repugnant to the Mica Control Order, 1940, made under the Defence of India Act. The Defence of India Act expired on 1-11-46 but was replaced by the Essential Supplies Act, 1946, which, however, came to an end on 26-1-55, and from that date, mica ceased to be an 'essential commodity'. The paramount legislation having thus been removed, *held*, the Bihar Mica Amendment Act, 1949 was revived with effect from 26-1-55.<sup>20</sup>

### 'To the extent of the repugnancy'.

When a State Act is repugnant to a Central law within the meaning of this clause, what becomes void is not the entire Act but only in so far as it is repugnant to the Central Act (subject to the doctrine of 'severability', *below*).<sup>21</sup> Thus, in a case where they occupy the same field, the identity of the field may relate to the pith and substance of the subject-matter and also the period of its operation. When both coincide, the repugnancy is complete and the *whole* Act becomes void. On the other hand, the operation of the Union law may be entirely *prospective* leaving the State law to be effective in regard to things already done, e.g., ss. 68C-68E of the Motor Vehicles Act, 1939, inserted by Act 100 of 1956. Hence, though the U. P., Transport Service (Development) Act, 1955 is repugnant to the Amendment Act made by Parliament, the schemes framed under the U. P. Act prior to the coming into force of the Union Act remain unaffected.<sup>22</sup>

### Doctrine of Severability.

1. The words 'shall be void' are to be read subject to the doctrine of severability, as under Art. 13 [see pp. 22-3, *ante*]. The doctrine of severability has been elaborately restated by the Supreme Court in *R.M.D.C. v. Union of India*<sup>23</sup> thus—

(i) In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.

(ii) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after

17. *Namboodripad v. C. D. Board*, A. 1956 T.C. 10 (23).

18. *Shrikant v. State of Bihar*, A. 1958 Pat. 496 (500).

19. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648.

20. *R.M.D.C. v. Union of India*, A. 1957 S.C. 628.

striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

(iii) Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(iv) Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

(v) The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

(vi) If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.

(vii) In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

2. The principle is applicable where, though an enactment as a whole is within the legislative competence of a Legislature, particular provisions of the enactment go outside the scope of the legislative Entry under which the Legislature enacted the law.<sup>21</sup>

### Doctrine of severability as applied to a taxing law.

1. Where an assessment is not for an entire sum, but for separate sums, each being earmarked to a separate assessable item, a Court can sever the sums and cut out one or more along with the sum attributed to it (as unlawful), while affirming the residue.<sup>22</sup>

But where the assessment consists of the single undivided sum in respect of the totality of property treated as assessable, and when one component part (not admissible as '*de minimis*') is on any view not assessable and wrongly included, the assessment is wholly bad.<sup>23</sup>

2. The above principle is also applicable when the constitutionality of a taxing law is impeached,<sup>24</sup> and severability in this context would include the separability in the enforcement of the tax.<sup>25</sup>

### Illustrations.

Art. 286 (2) of the Constitution (as it stood before the amendment of 1956) which exempted sales in course of inter-State trade made no distinction between modes of transport by which the goods were despatched. But r. 5 (2) (i) of the Rules framed under the Bombay Sales Tax Act, 1952 provided that in order to claim the above exemption, the goods must be despatched by specific modes of transport, such as railway. Held, that r. 5 (2) (i) was *ultra vires* but it was severable from the rest of the rules which imposed the tax and that it was possible for the State to separate at the assessment the receipts derived from the sales which were exempted by the Constitution from taxation

21. Cf. *Ramakrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538.

22. *Bennett & White v. Municipal District*, (1951) A.C. 786 (816).

23. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1099) : A. 1953 S.C. 1069.



and to enforce the law with respect to the constitutionally taxable subjects.<sup>22</sup>

3. Where an assessment consists of a single undivided sum in respect of the pre-Constitution as well as post-Constitution periods, and the post-Constitution assessment is invalid for contravention of Art. 286, the entire assessment must fail.<sup>24</sup>

### Cl. (2): Validation by President's assent.

1. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration (Art. 200), it will prevail notwithstanding its repugnancy to an earlier law of the Union.<sup>25</sup> This exception, again, is to be read subject to the Proviso.

2. But the President's assent to an Amending Act cannot cure the repugnancy of the principal Act.<sup>1</sup>

3. In the case of an Ordinance made by a Governor, the 'repugnancy' within the meaning of Art. 254 (2) would be cured if the Ordinance had been promulgated in pursuance of 'instructions' from the President [Proviso to Art. 213 (3), *ante*]. Otherwise, the Ordinance will be invalid.<sup>2</sup>

### Some instances of State acts validated by President's assent under Art. 254 (2).

(i) The Bihar Hindu Religious Trusts Act, 1951.<sup>3</sup>

(ii) Ss. 27-28 of the Orissa Estate Abolition Act, 1952,—notwithstanding repugnancy to s. 23 of the Land Acquisition Act, 1894;<sup>4</sup> or ss. 20 (2) and 28 (3) of the same Act,—notwithstanding repugnancy to the provisions of the Transfer of Property Act.<sup>5</sup>

(iii) Ss. 13-14 of the Assam State Road Transport Act, 1954,—notwithstanding repugnance to the Motor Vehicles Act, 1939.<sup>6</sup>

### Proviso.

1. The Proviso to Cl. (2) of the present Article empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent.

2. Parliament may repeal or amend the repugnant State law, either directly,<sup>7</sup> or by itself enacting a law repugnant to the State law, with respect to the 'same matter'.<sup>8</sup>

3. It has been held<sup>9</sup> that even though the subsequent law of Parliament does not expressly repeal the State law which was validated under Art. 254 (2), the State law will become void as soon as the subsequent law of Parliament, creating repugnancy, is made.

"Under the Constitution Parliament can, acting under the Proviso to Art. 254 (2), repeal a State law. But where it does not expressly do so, even then the State law will be void under that provision if it conflicts with a latter 'law with respect to the same matter' that may be enacted by Parliament."

24. *Ram Narain v. Asstt. Commr.*, (1955) 2 S.C.R. 483 (497).

25. *Biswambhar v. State of Orissa*, A. 1957 Orissa 246 (254) *Basti Sugar Mills v. State of U. P.*, A. 1954 All. 538 (546).

1. *Brij Bhukan v. S.D.O.*, A. 1955 Pat. 1 (S.B.).

2. *Bhupendra v. State of Orissa*, A. 1960 Orissa 46 (57).

3. *State of Bihar v. Bhabaprilananda*, A. 1959 S.C. 1078 (1080).

4. *Biswambhar v. State of Orissa*, A. 1957 Orissa 246 (254).

5. *Nalk v. Kanhu*, A. 1954 Orissa 186.

6. *Bhiman v. State of Assam*, A. 1957 Assam 139 (142).

7. *Zaverbhai v. State of Bombay*, (1955) 1 S.C.R. 799.

8. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (668).

*Illustration.*

S. 7 (1) of the Essential Supplies (Temporary Powers) Act, 1946 provided, *inter alia*, that the punishment for contravention of an order under s. 3 of the Act shall be imprisonment for a term which may extend to *three years*. Act No. 36 of 1947 of the Bombay Legislature provided that 'notwithstanding anything contained in the Essential Supplies Act, whoever contravenes an order under s. 3 of that Act shall be punished with imprisonment which may extend to *seven years* but "*shall not be . . . . . less than six months*". Owing to the avowed repugnancy, the Governor-General's assent to the Bombay Act was taken under the provisions of s. 107 (2) of the Government Act, 1935, so that the Bombay Act prevailed in that Province notwithstanding the repugnancy.

Parliament next enacted the Essential Supplies (Temporary Powers) Amendment Act (LII of 1950), by which s. 7 of the original Act was substituted by another section by which it was again provided that the punishment for contravention of an order under s. 3 of the original Act shall be imprisonment which may extend to *three years*, though it provided for an enhanced punishment up to *seven years* in certain circumstances. *Held*, that Act LII of 1950 was a law made by Parliament relating to the 'same matter' as the Bombay Act of 1947; that the provisions of the Act of Parliament were in conflict with those of the Bombay Act in such a manner as would have given rise to the doctrine of 'implied repeal'. Hence, the provision in the Bombay Act became void on the enactment of Act LII of 1950, so far as the matter of punishment for contravention of an order under s. 3 of the Essential Supplies Act was concerned.\*

**Conditions for application of the Proviso.**

The power of Parliament to repeal a State law under the Proviso is subject to certain limitations:

(a) The law made by Parliament (which seeks to repeal the State law) must be with respect to the '*same matter*' as the State law."

(b) The State law in question must have been made by the State Legislature with reference to a matter in the Concurrent List containing provisions *repugnant to an earlier law made by Parliament* and with the consent of the President. It is only such a law that could be altered, amended or repealed under the Proviso. Where the State law had been made covering a field not already occupied by Parliament, no question of exercising the power conferred by Parliament could arise."

(c) The power of repeal conferred by the Proviso is, however, expressly vested in Parliament, so that this power cannot be delegated by Parliament to any executive authority, and any order made by virtue of delegated authority from Parliament cannot have the effect of repealing a State law under the Proviso."

*Illustration.*

S. 7 (1) of the Sugarcane Control Order, 1955, made by the Central Government in exercise of the power conferred by s. 3 of the Essential Commodities Act (X of 1955) provided—

"The Sugar and Gur Control Order, 1950, published with the Government of India in the Ministry of Food and Agriculture S.R.O. No. 735, dated the 7th October, 1950, and any order made by a State Government or other authority regulating or prohibiting the production, supply and distribution of sugarcane and trade or commerce therein are hereby

8. *Zaverbhai v. State of Bombay*, A. 1954 S.C. 752: (1955) 1 S.C.R. 799.

9. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393.



repealed, except as respects things done or omitted to be done under any such order before the commencement of this order."

It was contended that the above provision had the effect of repealing the U. P. Sugarcane Regulation of Supply and Purchase Order, 1954, under the Proviso to Art. 254 (2). The contention was negatived on the ground that under the Proviso to Art. 254 (2), Parliament alone could effect a repeal of a State law referred to in Art. 254 (2) and that since this power could not be delegated, the Sugarcane Control Order made by the Central Government in exercise of delegated authority failed to repeal the U. P. Order.\*

#### Effect of repeal.

When a State law is repealed expressly or by implication by a Union law, s. 6 and not s. 24 of the General Clauses Act applies as to things done under the State law which is so repealed, so that a scheme framed under the State law before the repeal is saved.<sup>19</sup>

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

**"255.** No Act of Parliament or of the Legislature of a State \* \* \*, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

- (a) where the recommendation required was that of the Governor, either by the Governor or by the President ;
- (b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the president ;
- (c) where the recommendation or previous sanction required was that of the President, by the President.

#### Subsequent assent cures absence of previous sanction.

Thus, the absence of previous sanction to a Bill as required by the Proviso to Art. 304 does not invalidate an Act, if the Bill, as passed, received the assent of the President.<sup>12</sup>

## CHAPTER II.—ADMINISTRATIVE RELATIONS

### General

**"256.** The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parlia-

9. *Tika Ramji v. State of U. P.*, (1950) S.C.R. 393.

10. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (669).

11. Article 255 shall not apply to the State of Jammu and Kashmir.

12. *Gauri Shankar v. Jhunjhunn Municipality*, A. 1958 Raj. 192 (194).

13. In its application to the State of Jammu and Kashmir, article 256 shall be renumbered as clause (1) of that article and the following new clause shall be added thereto :—

"(2) The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and

ment and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Obligation of States and the Union.

**'Compliance with the laws'.**

The existence of a law sanctioning a particular action is a precondition for enforcing this Article.<sup>14</sup>

**257.** (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Control of the Union over States in certain cases.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

responsibilities under the Constitution in relation to that State; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India."

14. *Nirmal v. Union of India*, A. 1959 Cal. 506 (513).



**258.** (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

Power of the Union to confer powers, etc., on States in certain cases.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

<sup>15</sup>**258A.** *Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.*

Power of the States to entrust functions to the Union.

#### Object of Art. 258A.

This Article has been inserted by the Constitution (Seventh Amendment) Act, 1956, for the following reason—

"While the President is empowered by article 258 (1) to entrust Union functions to a State Government or its officers, there is no corresponding provision enabling the Governor of a State to entrust State functions to the Central Government or its officers. This lacuna has been found to be of practical consequence in connection with the execution of certain development projects in the States. It is proposed to fill the lacuna by a new article 258A."<sup>16</sup>

#### Relationship created under the Article.

The Orissa High Court<sup>17</sup> has held that when functions are entrusted by a State Government to the Government of India, the latter does not become an 'agent' of the former Government. This view overlooks the fact that the only effect of Art. 258A is to make possible a *delegation*

15. Inserted by the Constitution (Seventh Amendment) Act, 1956.

16. Statement of Objects and Reasons.

17. *Nikunja v. Duryodhan*, A, 1959 Orissa 58 (65).

which would otherwise have been impossible owing to the federal distribution of powers. The Government of India, therefore, becomes a delegate of the State Government in respect of the functions which are delegated.

### 259. *Omitted*<sup>18</sup>.

**260.** The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

**261.** (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

<sup>19</sup>(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

### Cl. (3) : 'Final judgment'.

The words evidently include 'decree' though that word is specifically mentioned in some other Articles.<sup>20</sup>

### 'Civil Courts'.

Cl. (3) has no application to orders of Criminal Courts.

### 'Territory of India'.

This expression, defined in Art. (3), *ante*, refers to a period after the commencement of the Constitution.

### 'According to law'.

1. Under this clause a decree passed in any State is executable in any other State of India. But this is subject to the law of procedure, limitation or the like relating to the law of execution in the State where and when execution is sought under this clause.<sup>21</sup>

2. If the decree was inexecutable in the latter State *when it was passed*, it cannot be executed because the Constitution has come into

18. Omitted by the Constitution (Seventh Amendment) Act, 1956.

19. In its application to the State of Jammu and Kashmir, in clause (2) of article, 261, the words "made by Parliament" shall be omitted.

20. *Narsing v. Shankar*, A. 1958 All. 775 (786).

21. *Dwarwadas v. Gokaldas*, A. 1952 Sau. 90.



force at the time of execution, because Art. 261 (3) is not retrospective.<sup>22, 24</sup>

3. Art. 261 (3) refers to decrees or orders passed after the Constitution came into force.<sup>22, 23, 24</sup>

In the result, a decree passed by a Court in British India prior to 26-1-50 cannot be executed, after 26-1-50, in a territory which formed part of an Indian State prior to 26-1-50.<sup>24</sup> Such decree cannot be said to have been passed by a Court situate within the 'territory of India'.<sup>22</sup>

4. An *ex parte* decree passed against a non-resident foreigner is to be regarded as a nullity by every other State. When, therefore, the *ex parte* decree of one State is sought to be executed in another, the dependent is entitled to question the jurisdiction of the Court which passed the decree, before the executing Court.<sup>1</sup>

#### Decrees of Part B State Courts between 26-1-50 and 31-6-51.

The Courts in the Part B States were 'foreign Courts' under the definition given in the law of Civil Procedure then obtaining in such States, until the amended definition in the Code of Civil Procedure was extended to the States from 1-4-51, by the Part B States (Laws) Act, 1951.

The question has arisen whether a decree passed by such Court between the commencement of the Constitution and the commencement of this Act would be executable in other parts of the territory of India, by virtue of Art. 261 (3).

One view<sup>2</sup> is that on the commencement of the Constitution, the territory of the Part B States became part of the territory of India, according to Art. 1 of the Constitution, so that the Courts of these territories ceased to be foreign Courts in relation to the rest of India, and that anything to the contrary in the law of civil procedure applicable to such territory must be held to be *ultra vires*.

The other view<sup>3, 4</sup> is that though the territory of the Part B States became part of the territory of India, the Courts in those territories did not cease to be foreign courts until the Part B States (Laws) Act was enacted, applying the amended definition in the C.P. Code to such Courts. As regards Art. 261, it has been held that it would not come into operation of its own force until legislation by Parliament under cl. (2) of that Article.<sup>5</sup>

22. *Subbaraya v. Palani Chetty*, A. 1952 Mys. 69 F.B., *Kantilal v. Dominion of India*, A. 1954 Cal. 67; *Ramkisan v. Harmukharai*, A. 1955 Nag. 103; *Varced v. Copalbai*, A. 1954 T.C. (F.B.); *Maloji Rao v. Sankar*, A. 1955 All. 490; *Augusthi v. Subramonia*, A. 1958 Ker. 15 (F.B.); *Radhe Sham v. Kundanlal*, A. 1956 Punj. 193 (F.B.); *Laxmichand v. Tipturi*, A. 1956 Raj. 81 (F.B.).

23. *Kishendas v. Indo-Carnatic Bank*, A. 1958 A.P. 407; *Narsing v. Shankar*, A. 1958 All. 775; *Metal Corpn. v. Colombi*, A. 1960 Mys. 1 (5).

24. But see, *contra*, *Bhagwan v. Rajaram*, A. 1951 Bom. 125; *Brajmohan v. Kishorilal*, A. 1955 M.B. 1 (F.B.); *Meherunissa v. Venkat*, A. 1955 Hyd. 184.

25. *Laxmichand v. Tipturi*, A. 1954 Raj. 81 F.B..

1. *Narsing v. Shankar*, A. 1958 All. 775 (787); *Subbaraya v. Palani Chetty*, A. 1952 Mys. 69 (F.B.).

2. *Ramdayal v. Shankarlal*, A. 1952 Hyd. 80 (F.B.); *Santhaff v. Chinnaya*, A. 1954 Mad. 1051; *Murari v. Bhagwan Das*, A. 1955 J. & K. 5 (F.B.).

3. *Augusthi v. Subramonia*, A. 1958 Ker. 15 (18) F.B.

4. *Narsing v. Shankar*, A. 1958 All. 775 (783, 787).

5. *Metal Corpn. v. Colombi*, A. 1960 Mys. 1 (6).

*Disputes relating to Waters*

**262.** (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

*Co-ordination between States*

**263.** If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

Provisions with respect to an Inter-State Council.

- (a) inquiring into and advising upon disputes which may have arisen between States ;
- (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest ; or
- (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

## PART XII

**FINANCE, PROPERTY, CONTRACTS AND SUITS**

## CHAPTER I.—FINANCE

*General*

**264.** In this Part, "Finance Commission" means a Finance Commission constituted under article 280. . . .<sup>1</sup>

Interpretation.

Taxes not to be imposed save by authority of law.

**265.** No tax shall be levied or collected except by authority of law.

1. Cls. (b) & (c) have been omitted by the Constitution (Seventh Amendment) Act, 1956.



### No taxation save by authority of law.

1. Art. 265 provides that not only the *levy* but also the *collection* of a tax must be under the authority of some law. Where an executive authority has been empowered to collect a tax by an invalid law or rules made thereunder, the Court is entitled to interfere.<sup>2</sup>

2. 'Law' in this context means an Act of the Legislature<sup>3,4</sup> and cannot comprise an executive order, or a rule without express statutory authority.<sup>5</sup> Art. 265 embodies the principle of 'no taxation without representation'. An executive order of a Rajpramukh, thus, cannot justify an imposition.<sup>6</sup> As in *England*, taxation under *our* Constitution is an exclusive function of the Legislature.

3. The observation in *S. Gopalan v. State of Madras*<sup>7</sup> to the effect that 'law' in Art. 265 also includes common law which continues to be in force under Art. 372 (1), overlooks the constitutional history of the doctrine embodied in Art. 265 and also the fact that the continuance under Art. 372 (1) itself is subject to the other provisions of the Constitution. The actual decision in the case is supportable on the ground that the Revenue Recovery Act II of 1864 is the statutory authority for the levy of land revenue in Ryotwari areas.

### No bar again being retrospective.

1. The Legislatures under *our* Constitution can legislate retrospectively [except in the matter of criminal laws; Art. 20 (1)] and taxing laws are no exception to this power.<sup>8</sup>

2. Where a Legislature has the power to levy a tax, it may, with retrospective effect, validate an illegal assessment of such tax by the executive, without proper legislative sanction.<sup>9</sup>

3. But it cannot give retrospective operation to a tax in respect of an area over which it had no territorial jurisdiction during the period of the retrospective operation.<sup>10</sup>

### No bar against double taxation.

Where more than one legislative authority, such as the State Legislature and a local or municipal body possess the power to levy a tax there is nothing in the Constitution to prevent the same person or object being subjected to both the State and municipal taxation.<sup>11,12</sup>

### 'Tax'.

1. This word, as used in the present article, includes any 'impost',—general, special or local. [Cf. Art. 367 (28)]. It would, thus, include not only 'taxes' but also duties, cesses or fees. It is clear, therefore, that even a duty, cess or fee cannot be levied without specific statutory authority.

[As to the distinction between a 'tax' and a 'fee', see p. 392 *post*].

2. *Chhotabhai v. Union of India*, A. 1952 Nag. 139 (144).

3. *Makeshwari v. State of U. P.*, A. 1957 All. 282.

4. *Joseph v. A. E. Commr.*, A. 1953 T.C. 146.

5. *State v. Beejlal*, A. 1954 Raj. 283.

6. *State of Kerala v. Joseph*, A. 1958 S.C. 296.

7. *S. Gopalan v. State of Madras*, (1958) 2 M.L.J. 117 (122).

8. *Union of India v. Madangopal*, (1954) S.C.R. 541.

9. *Sundararajan v. State of Madras*, A. 1956 Mad. 293.

10. *Ananthanarayana v. Agricultural I. T. O.*, A. 1959 Ker. 183 (188).

11. *Cantonment Board v. Western India Theatres*, A. 11954 Bom. 261.

12. *Satyanarayana v. East Godavari Market Committee*, A. 1959 A.P. 398 (404).

2. Any compulsory levy by the State (not based on contract) will, therefore, be invalid, unless authorised by law.<sup>13</sup>

**'Levied.'**

1. The increase of an existing duty constitutes the 'levy' of an impost and must equally be made under the authority of law in the manner prescribed by it.<sup>14</sup>

2. The words 'levy and collection' are used in this Article in a comprehensive sense and are intended to include the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen.<sup>15</sup> What the Article enjoins is that every stage in this entire process must be authorised by the law.<sup>16</sup>

**Validity of subordinate legislation.**

Taxation, in order to be valid, must not only be authorised by a statute, but must also be levied or collected in strict conformity with the statute which authorises it.<sup>17</sup>

(a) No tax can be imposed by any bye-law, rule or regulation, unless the statute under which the subordinate legislation is made specifically authorises the imposition.<sup>18,19</sup>

(b) Where the statute authorises the imposition of a fee for certain services to be rendered, the subordinate legislation cannot provide for the imposition of a tax, unrelated to the services, in the name of a fee.<sup>20</sup>

(c) Where the statute prescribes that the tax is to be assessed according to a particular basis, it cannot be assessed on a different basis. Thus, where the statute authorises imposition of a tax upon the income from profession, the authority cannot impose the tax upon the total income of the assessee within the prescribed area, including his income from property as well as profession;<sup>21</sup> similarly, where a State Act authorises a municipality to levy a fee on the 'registration of cattle', it cannot levy a fee graduated according to the price at which each cattle is sold.<sup>22</sup>

(d) Where a statute provides that a duty could be imposed by framing rules under the Act no duty can be imposed by an executive order without making rules under the Act, and complying with the procedure prescribed by it.<sup>23</sup>

(e) Where the statute provides that the subordinate authority can levy an imposition only with the sanction of a specified authority, an imposition made without such sanction is invalid.<sup>24</sup>

**Arts. 31 and 265.**—As there is a special provision in art. 265 of the Constitution that no tax shall be levied or collected except by authority of law, cl. (1) of art. 31 of the Constitution must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax.<sup>25</sup>

13. *Surajdin v. State of M. P.*, A. 1960 M.P. 129.

14. *State of Kerala v. Joseph*, A. 1958 S.C. 296.

15. *Rayalaseema Constructions v. Dy. Commercial Tax Officer*, A. 1959 Mad. 382.

16. *Narayana v. State of T. C.*, A. 1954 T.C. 504 (506).

17. *K. K. Samaj v. Nagpur Corpn.*, A. 1956 Nag. 152.

18. *Maheshwari Prasad v. State of U. P.*, A. 1957 All. 282.

19. *Cf. Bajranglal v. Commr. of Taxes*, A. 1959 Assam 216 (220).

20. *Phani v. Prov. of Bengal*, (1949) 54 C.W.N. 176 (180).

21. *Joseph v. Asstt. Excise Commr.*, A. 1953 T.C., 146.

22. *State of Kerala v. Joseph*, A. 1958 S.C. 296.

23. *Jeo Raj v. State of Rajasthan*, A. 1959 Raj. 73.

24. *Laxmanappa v. Union of India*, (1955) 1 S.C.R. 763; A. 1955 S.C. 3.



### Constitutional Limitations upon the taxing power.

Apart from the limitation imposed by the division of the taxing power between the Union and State Legislatures by the relevant Entries in the Legislative Lists, the taxing power of either Legislature is particularly subject to the following limitations imposed by particular provisions of our Constitution:

- (i) It must not deny equal protection of the laws (Art. 14).
- (ii) No tax shall be levied the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination (Art. 27).
- (iii) A State Legislature or any authority within the State cannot tax the property of the Union (Art. 285).
- (iv) The Union cannot tax the property and income of a State (Art. 289).
- (v) The power of a State to levy tax on sale or purchase of goods is subject to Art. 286.
- (vi) Save in so far as Parliament may by law otherwise provide, a State shall not tax the consumption or sale of electricity in the cases specified in Art. 287.
- (vii) No income tax shall be imposed on the privy purse of a Ruler where the payment of it, free of tax, has been guaranteed by a pre-Constitution covenant or agreement (Art. 291).

### Remedy for violation of Art. 265.

1. Not being included in Part III of the Constitution, Art. 265 does not confer a 'fundamental right'. Hence, an application under Art. 32 does not lie in case of an imposition not authorised by law.<sup>24,25</sup>

2. But an application under Art. 226 (e.g. *mandamus*) would lie for quashing an imposition made without authority of law or *ultra vires* the law under which the imposition is purported to be made;<sup>1</sup> for, the power under Art. 226 is exercisable not only for the enforcement of fundamental right but for 'other purposes' as well.

3. *Mandamus* is available also for directing a refund of an illegal or *ultra vires* levy, or for directing the State to forbear from collecting it.<sup>2</sup>

### Remedy for unconstitutional tax.

1. An unconstitutional tax must be distinguished from a tax imposed without the authority of law.

2. When some fundamental right is violated by the tax, a writ under Art. 32 or 226 is available, e.g., when a licence fee, being imposed without the authority of law, necessarily violates Art. 19 (1) (g)<sup>3</sup> or a sales tax which contravenes Art. 286<sup>4</sup> also offends against Art. 19 (1) (g).<sup>5,6</sup>

3. Even where no fundamental right is infringed but the taxing law is *ultra vires* for contravention of any other provision of the Con-

25. *Ramjilal v. Income-Tax Officer*, A. 1951 S.C. 97: (1950-51) C.C. 242.

1. *Union of India v. Madangopal*, (1952) S.C.R. 537; *Madhava-krishnaiah v. I. T. O.* (1954) S.C.R. 537; *Himmattal v. State of M. P.*, (1954) S.C.R. 1122.

2. *Sugar Syndicate v. Excise Commr.*, A. 1956 Panj. 222.

3. *S. T. O. v. Kanhaiya Lal*, A. 1959 S.C. 135.

4. *Rayalseema Constructions v. Dy. C. T. O.*, A. 1959 Mad. 382 (386).

5. *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

6. *Himmattal v. State of M. P.*, (1954) S.C.R. 1122; *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1077).

stitution (e.g., Art. 286) a writ under Art. 226 will be available,<sup>7</sup> to quash the assessment.<sup>8</sup>

### Refund of tax subsequently declared *ultra vires*.

1. The Supreme Court<sup>9</sup> has held that s. 72 of the Contract Act includes payment made either under mistake of fact or under mistake of law and that payment of a tax which is *ultra vires* or unconstitutional comes under its scope. Hence, when the tax is subsequently declared by a Court to be *ultra vires* or unconstitutional, the party is entitled to have a refund of it from the Government, whether he had paid it under protest or not.

2. Unless time-barred, the refund cannot be refused on the ground that the assessment was not challenged by way of appeal or revision<sup>10</sup> or that the assessment was 'final' under the terms of the taxing statute.<sup>11</sup>

3. The refund should be sought for in a suit<sup>12</sup> and not in an application under Art. 226.<sup>13</sup> In *S. T. O. v. Kanhaiya Lal*,<sup>14</sup> the Supreme Court granted the relief in a proceeding under Art. 226 because the Advocate-General stated before the High Court that he would not raise any objection in this behalf.

**266.** (1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the assignment

Consolidated Funds and public accounts of India and of the States.

of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by the Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

7. *Bengal Immunity Co. v. State of Bihar*, (1955) S.C.A. 1140 (1152-3); (1955) 2 S.C.R. 303.

8. *Usman v. State of Mysore*, A. 1960 Mys 93.

9. *S. T. O. v. Kanhaiya Lal*, A. 1959 S.C. 135.

10. *Orient Paper Mills v. State of Orissa*, A. 1957 Orissa 240.

11. *Rayalseema Constructions v. Dy. C. T. O.*, A. 1959 Mad. 382 (396).

12. *Union of India v. Kamath*, A. 1957 Mad. 110.

13. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (246).



**'Revenues received by the Government of a State'.**

Where a tax is levied for the purposes of a local authority and allocated by the taxing authority to the funds of that local authority, it could not be deemed to be a revenue received by the State and need not, therefore, go into the Consolidated Fund of the State.<sup>14</sup>

**267.** (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which Contingency Fund. shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under article 115 or article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor<sup>15</sup> of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under article 205 or article 206.

*Distribution of Revenues between the Union and the States*

**268.** (1) Such stamp duties and such Duties levied by the Union but collected and appropriated by the States. duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected—

- (a) in the case where such duties are leviable within any *Union Territory*<sup>16</sup> by the Government of India, and
- (b) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

14. *Shanmugha Oil Co. v. Market Committee*, A. 1960 mad. 160 (1965).

15. The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

16. Substituted by the Constitution (Seventh Amendment) Act, 1956.

Taxes levied and collected by the Union but assigned to the States.

**269.** (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely:—

- (a) duties in respect of succession to property other than agricultural land ;
- (b) estate duty in respect of property other than agricultural land ;
- (c) terminal taxes on goods or passengers carried by railway, sea or air ;
- (d) taxes on railway fares and freights ;
- (e) taxes other than stamp duties on transactions in stock-exchanges and futures markets ;
- (f) taxes on the sale or purchase of newspapers and on advertisements published therein.
- <sup>17</sup>(g) *taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.*

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to *Union territories*<sup>25</sup> shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) *Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.*

#### **Amendment.**

(a) In cl. (1), sub-cl. (g) has been added by the Constitution (Sixth Amendment) Act, 1956. Cl. (3) has also been added by the same Act.

(b) In cl. (2), for the words 'States . . . Schedule' have been substituted the words "Union territories" by the Constitution (Seventh Amendment) Act, 1956.

**Cl. (3) :** When a sale or purchase takes place in the course of inter-State trade or commerce.

In exercise of the power conferred by the present Clause, Parliament has enacted s. 3 of the Central Sales Tax Act, 1956, which lays down the principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce. [See under Art. 286, *post*].

**Tax on sale or purchase taking place in the course of inter-State trade or commerce.**

1. The power to impose taxes on the sale or purchase of goods where such sale or purchase has taken place in the course of inter-

17. Added by *ibid*.



State trade has been given exclusively to Parliament by Art. 269 (1) (g) and Entry 92A of List I, as inserted by the Constitution (Seventh Amendment) Act, 1956. In exercise of this power, Parliament has provided for the levy of a sales tax on inter-State sales, by Chapter III of the Central Sales Tax Act, 1956.

2. Cl. (3) of Art. 269 (see p. 386, *ante*) confers upon Parliament the power also to lay down the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce, so, as to be liable to the Union sales tax imposed under Art. 269 (1) (g). In exercise of this power Parliament has enacted s. 3 of the Central Sales Tax Act, 1956, which says—

"A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of the title to the goods during their movement from one State to another.

*Explanation 1.*—Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

*Explanation 2.*—Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

3. An interpretation of the above provision is important from the point of view of the States inasmuch as it constitutes a limitation upon their legislative competence.

### 'Movement of goods'.

1. It is clear from the above that the *physical* movement of the goods from one State to another is necessary to constitute 'inter-State trade or commerce', for the purposes of taxation of sales. This test takes no cognisance of the fact whether the consignee of the goods is a consumer or a trader.

2. A sale which occasions such inter-State movement of the goods is deemed to take place in the course of inter-State trade or commerce.

(i) No sale *anterior* to the actual movement of the goods is to be deemed to have taken place 'in the course of' inter-State trade or commerce unless the inter-State movement takes place *in pursuance of the contract of sale*."

The question of *intention* of the parties either at the time of the sale or at the time of the transportation is immaterial for the purpose. The test of sale in the course of inter-State trade or commerce is the inter-State movement taking place as a part of the contract of sale or as a necessary ingredient of the sale.

### *Illustration.*

1. X, a merchant in State A goes to State B, purchases goods there and transports them to A (obviously for the purpose of selling them in State A).

The sale in this case would not be "in the course of inter-State trade or commerce", because the transportation of the goods did not take place under any contract of sale. As a result, State B would be entitled to tax the sale which is entirely a local sale." This conclu-

18. This follows the view of Venkatarama J. in *Bengal Immunity v. State of Bihar*, (1955) 2 S.C.R. 603 (785).

sion would make no difference between a middleman-purchaser and a consumer-purchaser both of whom take the trouble of physically going over to another State to purchase the goods.

2. It is also immaterial if the goods were purchased in State B with the *intention* of sending them to State A, for the purchase in State B has not *occasioned* the movement of the goods from B to A. The sale is completed by delivery within State B and the subsequent movement of the goods does not take place in pursuance of the contract.<sup>19</sup>

In these cases, no complicated question can possibly arise as to the commencement or termination of the inter-State journey of the goods.

(ii) The same principle will apply to sales taking place after the termination of the inter-State movement.

#### *Illustration.*

X, a merchant of State A goes to State B, purchases the goods there, transports them to State A, and *thereafter* sells the goods in State A.

In this case, the sale taking place in State A, after the transportation, is purely a local sale in State A, and it would, accordingly, be liable to be taxed by State A. No doubt, the transportation was made with the object of the sale, but the sale which takes place *after* the movement has terminated cannot be said to have taken place 'in the course of the inter-State movement. In this case also, no inequity arises, for, State B had taxed the earlier transaction by which X acquired the goods.<sup>20</sup>

3. Any sale taking place *during* such inter-State movement of the goods, by transfer of documents of title would also be deemed to be a sale in the course of inter-State trade or commerce. For the purposes of this rule, the concept of duration of the movement is enlarged by the addition of the period of custody of the goods in the hands of a carrier or bailee for the purpose of transmission to and delivery at the other State. Expl. I, which provides for this enlargement, follows the principle in s. 51 of the Sale of Goods Act. The result is, that any sale which takes place while the goods are on their 'inter-State journey', i.e., from the moment of delivery to the carrier or bailee by the consignor until they are unloaded by or on behalf of the consignee in the other State, is a sale 'in the course of inter-State trade or commerce'. In the case of transportation by other means, e.g., floating logs down a river, the inter-State journey should end when the logs are taken over by the owner in the other State.

4. To constitute an inter-State movement, the two termini of the journey of the goods must be in two different States. This is provided in Expl. II. If the two termini are in different parts of the same State, the fact that the goods has to pass through another State in order to reach its destination will not make an inter-State movement for the purpose of sales taxation.

Taxes levied and collected by the Union and distributed between the Union and the States.

**270.** (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

19. *Indian Coffee Board v. State of Madras*, A. 1956 Mad. 449.

20. *Venkatarama J. in Bengal Immunity v. State of Bihar*, (1955) 2 S.C.R. 603.



(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to *Union Territories* or to taxes payable in respect of Union emoluments; shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to *Union territories*.

(4) In this article—

(a) "taxes on income" does not include a corporation tax;

(b) "prescribed" means—

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(c) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

**271.** Notwithstanding anything in articles 269, and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

**272.** Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.

**'Collected by the Government of India'.**

These words do not debar the Government of India from collecting the taxes through some other authority, acting as its agent.<sup>21</sup>

**273.** (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in article 270.

**274.** (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

**275.** (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such

Grants from the Union to certain States.

21. *Aluminium Corp. v. Coal Board*, A. 1959 Cal. 222 (231).



capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State :

Provided further that there shall be paid out of the Consolidated Fund of India as grant-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

- (a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule ; and
- (b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament :

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

**276.** (1) Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum :

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board

or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

**Art. 276: Taxes on professions, trades, callings and employments.**

This Article authorises a State or other local authority in a State to levy a tax on professions etc., for which the corresponding legislative Entry is 60 of List II. Now, when imposed on a person it would virtually amount to a tax on 'income' but income-tax (other than on agricultural income) is an exclusively Union subject [Entry 82, List I]. Hence, express provision is required in this Article to empower the State to levy a tax on professions etc., declaring that such a tax will not be invalid on the ground that it is a tax relating to income.<sup>22</sup> Cl. (3) makes a corresponding reservation in favour of Parliament to impose income-tax on incomes arising from professions etc.

**Cl. (1) : 'Tax in respect of professions, trades, callings or employments'.**

1. This expression is very wide. The tax may be imposed on professions and employments, including service, even though the employee is already paying income-tax. It may be imposed on trades or callings, e.g., on persons carrying on the trade of husking, milling or grinding of grains;<sup>23</sup> or on the subject-matter of the trade, e.g., each bale of ginned cotton,<sup>24,25</sup> or on the income arising from trade or profession.<sup>1</sup>

2. A tax on the manufacturing process does not cease to be so because it is levied upon the manager of the factory and not upon the owner of the commodity which is manufactured.<sup>1</sup>

3. But a tax on a commodity, without regard to any profession or trading activity cannot be a tax on professions or trade.<sup>2</sup> The basis of a tax under art. 276 is either the occupation or the income derived from it.<sup>2</sup> On the same principle, though a tax levied on a factory on the basis of the cloth or yarn produced therein may be a tax on trade, a fee payable on the number of persons employed in a factory and the horse-power installed therein, under rules framed under s. 6 of the Factories Act, can in no sense be said to be a tax on trade so as to attract the provisions of cl. (2) of the present Article.<sup>2</sup>

22. *District Board v. U. I. Sugar Mills*, A. 1957 All. 527.

23. *District Council v. Kishorilal*, A. 1949 Nag. 190.

24. *Municipal Committee v. N. E. I. Press*, A. 1948 Nag. 971.

25. *Municipality of Chopda v. Motilal*, (1958) 60 Bom. L.R. 48 (53).

1. *W. U. P. Electric Power Co. v. N. E. I. Press*, A. 1945 Nag. 971.

2. *Abraham v. State of T. C.*, A. 1958 Ker. 129 (134).



Even where the tax is levied upon the commodity produced by or related to the trading activity, the amount of tax levied on the person carrying on the trade per annum cannot exceed the maximum amount limited by Art. 278 (2), and, in case of an excess demand, the Court will reduce it to the permissible amount.<sup>3</sup>

### 'Trade'.

The word 'trade' in this Article is not used in the primary sense of an exchange of goods for money but in the wider sense of any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned profession or agriculture.<sup>4</sup> It thus includes a skilled occupation which involves the application of manufacturing process to a commodity submitted to the person carrying on the occupation, such as pressing or ginning cotton<sup>5</sup> or husking, milling or grinding grains.<sup>6</sup>

**Tax on entertainment and tax on Calling.** —See under Entry 62, List II, *post*.

### CL. (2) : The maximum limit.

It is a condition of the validity of a tax under this article that the imposition should not exceed Rs. 250/-. Where, therefore, a tax is imposed on the basis of a *percentage*, without fixing the maximum limit so that it is possible to levy more than Rs. 250/- in any case, the imposition will be invalid.<sup>7</sup>

**Proviso to cl. (2).**—The tax levied under ss. 108 and 114 of the U. P. District Boards Act comes under this Proviso and is, accordingly, saved from the bar imposed by the main paragraph of Art. 276 (2).<sup>8</sup>

The Bombay High Court<sup>9</sup> has held that the word 'tax' in this Proviso means a tax which was being 'lawfully levied' and the Proviso would not, therefore, save a tax which was in excess of the limit imposed by s. 142 A (2) of the Government of India Act, 1935. This view requires further consideration inasmuch as it seeks to insert in art. 276 an expression which does not occur there though it is used in the very next Article. Further, such an interpretation would practically render the Proviso nugatory. The words 'in force' have no implication of being lawfully levied or leviable.

**277.** Any taxes, duties, cesses or fees which immediately before the commencement of this Constitution<sup>10</sup>, were being lawfully levied by the Government of any Savings. State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

3. *Shrikrishna v. Ujjain Municipality*, A. 1953 M.B. 145.

4. *K. K. Samaj v. Nagpur Corpn.*, A. 1956 Nag. 152 (156).

5. *Gajadhar v. Municipal Committee*, A. 1958 Bom. 378.

6. In its application to the State of Jammu and Kashmir, references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e. the 14th May, 1954.

**Art. 277: Savings.**

1. This Article saves existing taxes levied by State or local authorities on subjects which may have been transferred by the Constitution from the State List to the Union List. For example, the power to impose duty on medicinal and toilet preparations containing alcohol belonged to the Provincial Legislature under Item 40 of List II of the Government of India Act, 1935, but it has been denied to the State Legislature by Entry 84 of List I and Entry 51 of List II of the Constitution. By reason of Art. 277, any such duty imposed by the Provincial Legislature and levied immediately before commencement of the Constitution shall continue to be levied until Parliament legislates to the contrary.<sup>7</sup>

2. The scope of the Article is limited and it has no application where there has been no shifting in the allocation of power as between the Union and the State under the Constitution, from that under the Government of India Act, 1935.<sup>8</sup>

**'Were being levied'.**

1. A Single Judge of the Madhya Bharat High Court<sup>9-10</sup> has held that the word 'levied' in the present Article means something other than the imposition of the tax etc. by the Act of the Legislature. In the context, it means enforcement or collection by the Executive, under authority of the law.) The reasoning which seeks to distinguish Art. 277 from Art. 372 is worth considering. While Art. 372 saves the pre-Constitution law and hence the imposition of the impost, Art. 277 authorises the continuance of the levy of those imposts which were actually being levied at the commencement of the Constitution.

According to the above view, therefore, if a Provincial Act, passed prior to the commencement of the Constitution imposed a duty, but the Act was to come into force on a date subsequent to the commencement of the Constitution, the levy of that duty is not continued by Art. 277.

2. The protection of this Article is obviously not available if the pre-Constitution law is replaced by a new Act after the Constitution;<sup>11</sup> or a new duty is imposed under the pre-Constitution Act, after the commencement of the Constitution.<sup>11, 12</sup>

**'Continue to be levied'.**

Art. 277 authorises the levy of 'existing taxes', etc. until provision to the contrary is made by Parliament by law. There is nothing in the Article to preclude Parliament from providing for such levy or collection by a new machinery.<sup>13</sup>

**Distinction between a tax and a fee.**

1. A tax is an imposition made for a public purpose, without reference to any services rendered by the State or any specific benefit to be conferred upon the tax-payer. The object of the levy is to raise the general revenue.

2. A fee is a payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on a

7. *Nageswara v. State of Madras*, A. 1954 Mad. 643 (649).

8. *Liberty Cinema v. Calcutta Corpn.*, A. 1959 Cal. 45 (54).

9. *Ram Prasad v. War Profits Tax Officer*, A. 1953 M.B. 20.

10. *Chhutilal v. Bagmal*, A. 1956 M.B. 177.

11. *Nageswara v. State of Madras*, A. 1954 Mad. 643 (649).

12. See, *contra*, *Municipal Corpn. v. Sohna*, A. 1960 Panj. 497 (500).

13. *Madhavakrishnaiah v. I. T. O.*, (1954) S.C.R. 537: (1952-4)



principle just opposite to that of a tax. While a tax is paid for the common benefits conferred by the Government on all tax-payers, a fee is a payment made for some special benefit enjoyed by the payer and the payment is usually proportional to the special benefit.<sup>14</sup> The money raised by a fee is set apart and appropriated specifically for the performance of the service for which it has been imposed and is not merged in the general revenues of the State.<sup>14, 15</sup>

3. While in the case of a tax, there is no *quid pro quo* between the tax-payer and the State, the amount of fee is based upon the expenses incurred by the State in rendering the services (though in the case of a particular fee, the amount may not be arithmetically commensurate with the expenses). In any case, in assessing a fee, no account is taken of the varying abilities of the different assesseees.<sup>14, 17</sup>

### Illustrations.

(i) S. 76 of the Madras Hindu Religious and Charitable Endowments Act, 1951 levied an annual fee on all religious institutions, fixing the maximum rate at 5% of the income derived by them, and money raised by the levy went into the Consolidated Fund of the State. *Held*, that the levy was not a fee but a 'tax' so that the legislation was not covered by Entry 47 of List III. The reasons for holding that it was a tax were—(i) the contribution levied has been made to depend upon the capacity of the payer and not upon the quantum of benefit that is supposed to be conferred on any particular religious institution; (ii) the money raised by the levy is not ear-marked or specified for defraying the expenses that the Government has to incur in performing the services.<sup>14</sup>

(ii) Where a municipality, empowered to levy a registration fee on animals, imposed a graduated fee on the sale of animals, according to the amount of the sale price, *held*, the imposition was not a fee but a tax, because it was not correlated to the services rendered by the municipality and the amount of the levy varied according to the sale price even though the animals belonged to the same class.<sup>14</sup>

(iii) Similarly, a licence fee imposed by a Municipality on factories on the basis of their horse-power cannot be upheld as a 'fee', unless it is shown that the fee is levied for some specific service rendered by the Municipality, apart from the general purposes of 'local government'.<sup>14</sup> Where the object of the imposition is to raise general revenue for the purpose of running the municipal administration, it is a tax, even though it may have been described as a licence fee.<sup>14</sup>

(iv) On the other hand, the tax levied under s. 270 of the Madras District Municipalities Act, 1920, is a 'fee' and not a tax inasmuch as

14. *Commr. H. R. E. v. Lakshminidra*, A. 1954 S.C. 282 (296).

15. As has been pointed out in *Gopi Prasad v. State of Punjab*, A. 1957 Punj. 45 (48), this is not a sure test in all cases, since under Art. 266, all the revenues of the State, whether derived from taxes, duties or fees, are to form one 'Consolidated Fund'. Thus, court-fees realised under Arts. 146 (3) and 229 (3) are 'fees' even though they form part of the general revenues [*Khachera v. S. D. O.*, A. 1960 All. 462]. Of course, a separate Fund is sometimes constituted by the legislation imposing a fee [cf. *Sudhindra v. Commr.*, A. 1956 Mad. 491 (500)]. But even then the imposition has to be held to be a tax and not a fee, if the 'quid pro quo' is absent or the levy is 'excessive' [cf. *Kutti Keya v. State of Madras*, A. 1954 Mad. 621].

16. *K. Samaj v. Nagpur Corpn.*, A. 1956 Nag. 152.

17. *Liberty Cinema v. Calcutta Corpn.*, A. 1959 Cal. 45.

18. *M. K. Mills v. Kishangarh Municipality*, A. 1960 Raj. 135.

19. *Sarat v. Calcutta Corpn.*, A. 1959 Cal. 36.

it is levied for the specific purpose of regulating the sale of articles in the public streets.<sup>20</sup>

4. Where the law provides that the surplus, if any, after meeting the expenses of the service rendered, shall be spent for *general purposes*, other than the cost of maintenance of the service, the imposition cannot be treated as a fee.<sup>21</sup>

5. The distribution of the power to levy a tax is not identical with that of the power to levy a fee. Taxes are specifically distributed as between the Union and State Legislatures by various Entries in Lists I and II and the residuary power to levy a tax which is not enumerated in any of these Entries belongs to Parliament, under Entry 97 of List I.

On the other hand, there is an Entry relating to 'fees' at the end of each of the three Lists,—I, II and III, and the Entry is to this effect—"Fees in respect of any of the matters in the List. . . ." The result is that each Legislature has the power to levy a fee which is co-extensive with its power to legislate with respect to substantive matters and that either Legislature may, while making a law relating to a subject-matter within its competence, levy a fee with reference to the services that would be rendered by the State under such law.

It follows, accordingly, that whenever the question of the legislative competence or validity of an imposition is raised, the Court has to enquire into its real nature, according to the tests discussed above. Thus, even though an imposition is labelled as a fee, if it appears to the Court that it is not a 'fee' but a 'tax', the next question to be determined is whether the power to levy such specific tax has been assigned to that Legislature by the Entries in the Lists over which its power extends; if not, the Court must declare the imposition as *ultra vires*.<sup>22</sup>

### Tax and Cess.

1. A cess is a tax confined to a local area for a specific object or a particular purpose.<sup>23</sup> It is a form of taxation and the word 'tax', used in its generic sense in Arts. 265-6, includes a cess.<sup>24</sup>

2. Since draftsmen often use the terms 'tax' and 'cess' rather indiscriminately, the validity of an imposition is to be determined with reference to its nature and not whether it is labelled as a 'tax' or a 'cess'.<sup>25</sup>

3. A cess being a tax and not a fee, no *quid pro quo* between a service rendered and the levy is necessary to maintain its validity.<sup>26</sup> Even though the proceeds of a cess go to a local fund, if the levy is not in respect of any particular service rendered, it is a tax.<sup>27</sup>

### 278. Omitted.<sup>1</sup>

279. (1) In the foregoing provisions of this Chapter,

Calculation of "net proceeds", etc.

"net proceeds" means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty,

20. *Municipal Council v. Venkateswara*, A. 1957 Andhra 103 (107).

21. *Mukundaraya v. State of Mysore*, A. 1960 Mys. 18 (23).

22. *Commr., H. R. E. v. Lakshmindra*, A. 1954 S.C. 282 (296).

23. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (241).

24. *Shanmugha Oil Mill v. Market*, A. 1960 Mad. 160 (164).

25. *Habhubha v. State of Bombay*, A. 1959 Bom. 43 (46).

1. Art. 278 has been omitted by the Constitution (Seventh Amendment) Act, 1956.



or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

**280.** (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—

- (a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds ;
- (b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India ;

\* \* \* \*

(c) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

**281.** The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Recommendations  
of the Finance Com-  
mission.

2. Sub-Cl. (c) of Cl. (3) has been omitted by the Constitution (Seventh Amendment) Act, 1956.

**282.** The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

Expenditure defrayable by the Union or a State out of its revenues.

**Scope of expenditure by Union or State.**

This Article provides that the spending power of the Union or the State Legislature is not limited to the legislative powers conferred upon it. In other words, though the lists in the 7th Schedule define the legislative powers of the Union and the State, in the matter of *expenditure*, neither is circumscribed within the lists assigned to it. The only limit to the power of the Union or a State to spend on a purpose not included within its legislative power is that the purpose must be 'public'. By virtue of the Article, it will be possible for a State to make grants in favour of the institutions and Universities specified in Entries 63-4 of List I.

In view of the provisions of Arts. 25-7, the exercise of religion is a 'private' purpose under *our* Constitution and the State cannot make expenditure of public revenues for the establishment of any religion or for the promotion thereof. When, however, the State takes over the management or superintendence of the properties of a religious institution or endowment in the interests of 'public order, morality or health' or to control its secular activities, the expenditure of money for the purpose of such administration is not an expenditure for the purposes of any religion but for regulation by the State of secular activities, which is a 'public purpose' within the meaning of Art. 282.<sup>3</sup>

**283.** (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor . . . of the State.

3. Cf. *Narayanan v. State of Madras*, A. 1954 Mad. 385 (390).



**284.** All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or

(b) any court within the territory of India to the credit of any cause, matter, account or persons, shall be paid into the public account of India or the public account of the State, as the case may be.

**285.** (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

Exemption of property of the Union from State taxation.

(b) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

#### Exemption of property of the Union from State Taxation.

The system of double government set up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another.

Our Constitution embodies this principle in Arts. 285 and 289. The present Article deals with immunity of the property of the Union from State taxation.

#### CL. (1) : Property.

The expression "property" in this Article has been used in a perfectly general sense and would include land, building, chattels, shares, debts and in fact everything that has a money value in the market and comes within the purview of any taxing statute.<sup>4</sup> Naval, Military and Air Force works, specified in List I (6), would come within this expression.

The ownership of land and the building standing thereon may belong to different persons.<sup>5</sup> Hence, the liability of the building to taxation may be different from that of the land.<sup>4</sup>

#### 'Property of the Union'.

1. No tax can be levied upon the property of the Union, whatever be the mode of assessment.<sup>4</sup>

2. It is competent for the State Legislature to impose a tax directly on the interest of a lessee or occupier of Union property, but if the property is valued and assessed as a whole as the basis of the tax and then the liability is apportioned between the owner and the

4. *Corporation of Calcutta v. St. Thomas' School*, (1948) 53 C.W.N. 231, affirmed by (1949) F.C.R. 368.

occupier, it is a tax on property, and Union property must be exempted.<sup>4</sup>

**"Save in so far as Parliament may by law otherwise provide".**

These words suggest that Parliament<sup>5</sup> may by law permit a State or any authority within a State to impose a tax on Union property. The object of Cl. (1), thus, is not to prevent State or local taxation of Union property, altogether, but to bring it under control of Parliament.

**"All taxes".**

The word "tax" in this context is to be interpreted in a wide sense, including any imposition or levy in the nature of a tax. For, otherwise, the State Government would be able to do something indirectly what it cannot do directly. This also follows from Art. 366 (28), *post*.

**"Any authority within a State".**

This expression makes it clear that the exemption relates not only to taxes imposed by the State itself, but also by subordinate bodies like Municipalities and other local authorities,<sup>6</sup> who cannot possibly have a larger power than the State itself by which they are created.

**Cl. (2) : "Liable or treated as liable".**

These words mean that in order to come within the Proviso, the property must have been in physical existence immediately before the commencement of the Constitution. There could have been no liability attached to a non-existent thing; nor could there have been any treatment of a non-existent thing. New buildings and structures erected on the land after the aforesaid date are therefore exempt from tax though the land on which they have been erected may be liable to tax under Cl. (2).<sup>7</sup>

Four conditions are necessary to bring a property within Cl. (2) in order to make it liable to taxation :

- (a) Physical existence of the property immediately before the commencement of the Constitution;
- (b) Liability of the property to the tax on that date;
- (c) Physical existence of the property now, i.e., at the time when the tax is sought to be levied;
- (d) Liability of the property to tax now.<sup>8</sup>

**"Treated as liable."**

These words, as an alternative to 'liable', have been evidently used to obviate the contention that any taxes which had in fact been collected before the commencement of the Constitution, were not legally payable.<sup>9</sup> All taxes which were in fact collected prior to

5. *Turf Properties v. Corpn. of Calcutta*, A. 1957 Cal. 431 (437).

6. Under the corresponding provision in s. 154 of the Government of India Act, 1935, the Central Legislature made the Railways (Local Authorities' Taxation) Act, 1941 [*Union of India v. Municipal Commr.*, A. 1959 Pat. 216 (218)].

7. Cf. *Governor-General in Council v. Corporation of Calcutta*, A. 1948 Cal. 116 (122), affirmed by *Corporation of Calcutta v. St. Thomas' School*, (1949) F.C.R. 368.

8. G.-G. in Council v. *Corporation of Calcutta*, (1947) 52 C.W.N. 173, approved in *Corporation of Calcutta v. St. Thomas' School*, (1949) F.C.R. 368.

9. There was a divergence of judicial opinion [cf. *Bell v. Municipal Commrs.*, (1902) 25 Mad. 457; *Secy. of State v. Mathura*, (1890) 14 Bom. 213], prior to the Government of India Act, 1935 as to whether the



the commencement of the Constitution will continue, unless the Union Parliament enacts any law to the contrary.<sup>10</sup>

**"Immediately before the commencement of Constitution".**

Cl. (2) says that properties which were liable or treated as liable to tax before the commencement of the Constitution, will continue to be so liable, until the Union Parliament legislates to the contrary. The effect of this clause, read with the Proviso to s. 154 of the Government of India Act, 1935 is—

If a property was not liable to taxation under the Government of India Act 1935, it is evident that it was not 'liable at the commencement of the Constitution'. Hence, any property which was non-existent on 1-4-37 and has been subsequently acquired or created would not be liable to be taxed under cl. (2) of Art. 285.

Thus, a building constructed after 1-4-37 cannot be made liable to taxation under cl. (2) of this Article.<sup>11</sup> In *G.-G. in Council v. Corporation of Calcutta*,<sup>12</sup> Ormond J. went further and opined that even capital improvements and alterations made to an existing building after 1-4-37 would be exempted from the operation of the Proviso to s. 154 of the Government of India Act, 1935 [to which cl. (2) of Art. 285 corresponds].

But the fact that on 1-4-37 the ownership of the property belonged to a party other than the Government is immaterial provided the property belonged to the Union Government at the commencement of the Constitution and was liable to the taxation on that date.<sup>13</sup>

**Illustration.**

The premises in question belonged to the Bengal Telephone Corporation up to April, 1943 and was liable to taxation by the Corporation till then. In April, 1943, Government of India acquired the premises and the Corporation continued to assess and collect the tax from the Government up to the second quarter of 1950-51, i.e., up to a post-Constitution period.

On behalf of the Government, it was contended that Government was not liable to pay the tax inasmuch as the ownership of the property did not belong to the Government on 1-4-37 when s. 154 of the Government of India Act, 1935 came into force. Rejecting this contention, held, that Art. 285 (2) of the Constitution, read with s. 154 of the Government of India, 1935 did not require that the property must have been assessed to the tax as Government property on 1-4-37. Since the property belonged to the Government at the commencement of the Constitution and was actually assessed to the tax on that date, it was 'treated as liable' within the meaning of Art. 285 (2) and, accordingly, the levy must be valid so long as Parliament does not legislate otherwise.<sup>13</sup>

**'That tax'.**

The authority conferred by cl. (2) is to continue to levy 'that tax', i.e., the identical tax, having regard to its nature and character and

properties of the Crown could be bound by taxing statutes. In order to obviate such controversy, the words 'treated as liable' were inserted in s. 154 of the Government of India Act, 1935], and continued in the present article of the Constitution.

10. *Corporation of Calcutta v. St. Thomas' School*, (1949) F.C.R. 368, affirming *G.-G. in Council v. Corporation of Calcutta*, (1948) 53 C.W.N. 231.

11. *G.-G. in Council v. Corp'n. of Calcutta*, (1948) 53 C.W.N. 231, Ormond J.

12. *Corp'n. of Calcutta v. Union of India*, A. 1957 Cal. 548.

not its quantum or rate. So long as it remains the same, there is nothing to prevent the State or local authority to increase or reduce its rate, in the usual manner, and according to its needs or to revise the valuation of the property which is subject to the tax. The variation of the quantum or rate does not affect its power to continue to levy the tax so long as it remains 'that tax', on its nature, character or species. So long as the tax remains the same, it is only Parliament which can prevent the continuance of levy of that tax by the State or local authority.<sup>13,14</sup> Of course, if additional structures are constructed after the commencement of the Constitution, they would not be covered by Art. 285 (2).<sup>14</sup>

**286.** (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

- |   |   |
|---|---|
| Restrictions as to<br>imposition of tax on<br>the sale or purchase<br>of goods. | (a) outside the State ; or<br>(b) in the course of the import of the<br>goods into, or export of the goods<br>out of, the territory of India. |
|---|---|

\* \* \* \*

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

**Amendment.**—The Constitution (Sixth Amendment) Act, 1956<sup>15</sup> has made the following changes in the Article—

(a) In cl. (1), the *Explanation*, which ran thus, has been omitted :  
"*Explanation.*—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

(b) Cl. (2), which was as follows, has been substituted—

"(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is

13. *G.-G. in Council v. Corporation of Calcutta*, (1947) 52 C.W.N. 173.

14. *Union of India v. Lucknow Municipality*, A. 1957 All. 452 (455).

15. Came into force on 11-9-56.



contrary to the provisions of this clause, continue to be levied until the thirtyfirst day of March, 1951."

(c) Cl. (3) has also been substituted. The original cl. (3) was as follows :

"(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."<sup>18</sup>

### Objects of Amendment.

1. The Explanation, which introduced a legal fiction to determine the situs of a sale, led to difference of opinion in the Supreme Court itself<sup>17, 19</sup> as to the scope of the Explanation. In order to obviate such controversy, the Explanation has been omitted and power has been given by the new Cl. (2) to Parliament to lay down the principles for determining when a sale shall be deemed to have taken place within a State within the meaning of Cl. (1) (a). In pursuance of this power, Parliament has enacted the Central Sales Tax Act, 1956, s. 4 of which provides a simple test of the physical location of the goods for determining the situs of a sale as between more than one States.

2. Cl. (2) did not altogether take away the legislative competence of the States to impose a tax on sales taking place in the course of inter-State trade or commerce, but subjected it to legislation by Parliament.<sup>20</sup> By Entry 92A of List I, introduced by the Constitution (Sixth Amendment) Act, 1956, the legislative power to tax sales taking place in the course of inter-State trade and commerce has been vested exclusively in Parliament. Hence, the original cl. (2) has become unnecessary.

3. Instead of the 'essential' goods, the new cl. (3) deals with goods declared by Parliament to be of special importance in inter-State trade. This provision has been necessary in order to render effective the exclusive power of Parliament to tax sales taking place in the course of inter-State trade or commerce. Even though a sale does not take place in the course of inter-State trade or commerce, State taxation shall be subject to Parliamentary control if the sale relates to goods which are of special importance in inter-State trade as declared by Parliament. This is another provision devised to eliminate State barriers to the free flow of inter-State transactions.

### Art. 286: Restrictions upon imposition of sales tax by a State.

1. The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State [Entry 54, List II]. But 'taxes on imports and exports' [Entry 84, List I] and 'taxes on inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Art. 286 is intended to ensure that sales taxes imposed by the States do not interfere with imports and inter-State trade and commerce, which are matters of national concern, and are beyond the competence of the State. Hence, the present Article lays down certain limitations upon the power of the States to enact sales tax legislation.

These are—

(a) No tax shall be imposed on sale or purchase which takes place outside the State (Cl. (1) (a)).

16. For comments upon the original article, see C3, Vol. II, p. 381, *et seq.*

17. *State of Bombay v. United Motors*, (1953) S.C.R. 1069.

18. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603.

19. This left a scope for ingenious arguments, as in *Mysore Spinning Co. v. Dy. Commercial Tax Officer*, A. 1957 Mad. 368 (371).

(b) No tax shall be imposed on sale or purchase which takes place *in the course of import into or export out of India* [Cl. (1) (b)].

2. In connection with inter-State trade and commerce, there are two limitations—

(a) The power to tax sales taking place 'in the course of inter-State trade and commerce' is within the exclusive competence of Parliament [Art. 269 (1) (g); Entry 82A of List I].

(b) Even though a sale does not take place 'in the course of inter-State trade or commerce', State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to 'goods declared by Parliament to be of *special importance* in inter-State trade and commerce' [cl. (3)].

#### Cl. (1): A tax on sale or purchase.

As to the nature and incidence of this tax, see under Entry 54, List II, *post*. The transaction that is taxed is the transaction of sale which means the transfer of ownership from one person to another. The above expression means that the tax may be imposed upon *either* party to the transaction.

S. 2 (g) of the Central Sales Tax Act, 1956 defines a 'sale' as follows—

"Sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge of pledge on goods;"

'Goods' are defined by s. 2 (d) as follows—

"Goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include *newspapers*, actionable claims, stocks, shares and securities."

#### Sub-cl. (a): 'Outside the State'.

1. This means outside the State seeking to impose the tax. The object of this sub-clause is to prevent multiple taxation of a single transaction.

2. In exercise of the power conferred by amended cl. (2), Parliament has formulated the principles of determining when a sale or purchase takes place outside a State, by enacting the Central Sales Tax Act (74 of 1956), s. 4 of which says—

"(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State—

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such an appropriation.

*Explanation.*—Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places."

3. S. 3 of the Act (see p. 501, *ante*) lays down when a sale or purchase is said to take place in the course of inter-State trade or commerce. This means that a transaction comes under s. 3, it cannot be said to have taken place 'inside' any State.



### Situs of the sale.

1. The Explanation to Cl. (1) (g), which has been omitted by the Constitution (Sixth Amendment) Act, 1956, provided for the determination of the situs of the sale according to a legal fiction, namely, that of actual delivery as a direct result of the sale for the purpose of consumption in a State. This resulted in a difference of opinion<sup>21,22</sup> in the Supreme Court itself, as to what constituted 'actual delivery' and 'consumption' read with the Explanation.

2. In order to obviate such controversy, the Central Sales Tax Act has adopted the simple test of the physical location of the goods for determining the situs of the sale. For this purpose, the Act makes a distinction between 'ascertained' and 'unascertained' goods (which terms are obviously used in the same sense as in the Sale of Goods Act, 1930).

(a) In the case of the sale of *ascertained* goods, the material point of time is when the contract of sale is made. The sale will be deemed to have taken place in that State where the goods are *physically* located at that point of time.

(b) In the case of *unascertained* goods, the location of the goods at the time of their *appropriation* to the contract of sale would be the test.

What is meant by 'appropriation to the contract' will be clear from s. 23 of the Sale of Goods Act, 1930, which says—

"(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The point of time which is relevant under this head is not the *ascertainment* but the *appropriation* of the goods to the contract of sale, which results, generally speaking, in the passing of the goods.

It is clear from the language of s. 23 itself, that the appropriation may be by the seller with the assent of the buyer or by the buyer with the assent of the seller, that assent to appropriation may be express or implied and that it may be given after the appropriation or in advance before such appropriation.<sup>22</sup>

3. In some cases of the sale of unascertained or future goods it may happen that the seller or the buyer may make an appropriation of the goods without the assent of the other party and put them into the course of transit. It may in such cases happen that the location of the goods when the assent of the buyer or seller is given to the appropriation is different from their location at the time when the seller or the buyer made the appropriation. In order to provide for them s. 4 (2) (b) of the Act lays down that the location of the goods at the time of the appropriation by the seller or the buyer irrespective of their location at the time when the assent of the other party is given to the appropriation should be the decisive factor in determining the situs of the sale. Under s. 4 (2) (b), the time of appropriation is the relevant

20. *State of Bombay v. United Motors*, (1953) S.C.R. 1069.

21. *Bengal Immunity v. State of Bihar*, A. 1955 S.C. 661 : (1955) 2 S.C.R. 603.

22. *Commr., S. T. v. Husenali*, (1960) 1 S.C.A. 58 (72).

time and the consent of the other party may be subsequent to the appropriation.

'Location of the goods', of course, means the location of the goods in the form which constituted the subject-matter of the agreement.<sup>23</sup>

4. In order to avoid any controversy, s. 4 (1) of the Act makes it clear that as soon as a sale is deemed to have taken place within a State it shall be deemed to have taken place outside all other States.

5. The Explanation to s. 4 provides that where goods situated in two or more States were sold under one contract of sale, the contract should be deemed to be divisible and regarded as separate contracts (for the purposes of Sales Tax), relating to goods located in each State.

6. The words 'subject to the provisions of s. 3' exclude sales in the course of inter-State trade and commerce from the concept of sale 'inside a State'.

**Cl. (1) (b): No tax on sales in course of import into or export out of India.**

1. This sub-clause prevents a State from levying a sales tax so as to interfere with the Union's legislative powers with respect to import and export across customs frontiers (Entry 41, List I) and duties of customs including export duties (Entry 83 of List I).

2. As explained by the Supreme Court,<sup>24</sup> the object underlying the exemption from sales-taxation given by the present clause is also to avoid double taxation of the foreign trade of the country which is of so great importance to the nation's economy. The double taxation sought to be avoided consisted in the imposition of export duty by the Central Government and the imposition of sales-tax by the State Government in its different aspects as an export and as a sale. Such double taxation is avoided by exempting the export-sale and the import-purchase from the levy of sales-tax by the State.

3. The ban imposed by sub-cls. (a) and (b) are independent and each one of these bans has to be surmounted before a State can impose a tax on the sale or purchase of goods.<sup>25</sup>

**'In the course of import or export'.**

1. S. 5 of the Central Sales Tax Act, 1956, enacted in pursuance of the power conferred by amended cl. (2) of this Article, lays down the principles for determining when a sale or purchase takes place in the course of import or export. It says—

"(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

2. According to the foregoing section, a transaction of sale or purchase may take place in the course of export or import in one of two ways, as suggested in the second *Travancore-Cochin case*,<sup>26</sup> viz.—

(a) Where a sale or purchase occasions an import into an export out of the territory of India;

23. *Commr., S. T. v. Husenall*, (1960) 1 S.C.A. 58 (72).

24. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R.

53.

25. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661.



(b) Where a sale or purchase by transfer of shipping documents takes place before or after (as the case may be) the goods have crossed the customs frontiers of India.

These two classes of cases may now be explained.

1. *Sale or purchase which occasions the export or import.*

Following the majority decision in *State of T. C. v. Shanmugha*,<sup>22</sup> the Central Sales Tax Act lays down that a transaction which directly or immediately leads to the export or import takes place 'in the course of' export or import. Hence,

(i) Export sales of commodities to foreign buyers on c.i.f. or f.o.b. terms fall within the scope of exemption under this clause.<sup>23</sup>

(ii) Import purchases are similarly exempted from sales-tax.<sup>24</sup>

It is now clear that a sale in the course of export or import shall not include the first sale after import or the last purchase preceding the export.<sup>1</sup> All sales preceding the one that occasions the export are taxable even if the goods are manufactured with the object of export.<sup>2</sup>

(a) The fact that the importer effects the sale through commission agents resident in another State does not alter the position if the goods are purchased *on behalf of* the importer and delivered direct from the foreign country into the State of the importer.<sup>3</sup>

#### Illustration.

An importer in the State of Travancore-Cochin purchases cashew-nuts from East Africa through intermediaries in Bombay. The goods are shipped direct from East Africa to a port in the State of Travancore-Cochin, in favour of the importer. The Bombay intermediaries only act as the commission agents of the importer, arrange for the purchase on behalf of the importer, get delivery of the shipping documents on payment at Bombay through a bank which advances money against the shipping documents and collects the same from the importer at the destination. *Held*, the purchase by the Bombay intermediaries is a purchase which occasions the import and the purchase is made by the importer in the State of Travancore-Cochin, privity being established between him and the African sellers. Hence, the purchase is exempted from sales-tax in the State of Travancore-Cochin.<sup>4</sup>

(b) In the case of a sale direct by the exporter to the foreign buyer, even where the property in the goods passes to the foreign buyers and the sale is thus completed within the State *before* the goods commence the outward journey, the sale must, nevertheless, be regarded as having taken place in the course of the export trade, and are, therefore, exempt under Art. 286 (1) (b). That clause indeed, assumes that the sale has taken place *within* the limits of the State and exempts it if it takes place 'in the course of the export' of goods concerned.<sup>5</sup>

(c) The last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or exported to be received subsequently in the ordinary course of business, is *not* a sale 'in the course of export'.<sup>6</sup> It is immaterial for the application of this rule whether commodity which

1. The Act follows the majority view in preference to that of Das J. in *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 52 (71).

2. *State of Mysore v. Mysore Spinning & Mfg. Co.*, A. 1958 S.C. 1002 (1005).

3. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 53; A. 1953, S.C. 333.

4. *State of T. C. v. Bombay Co.*, (1952) S.C.R. 1112 (1120).

is exported is the same<sup>5</sup> as that which was purchased from the internal market or it has been subjected to some further process since then,<sup>6</sup> or the commodity so purchased is specially packed and marked 'for export only'.<sup>6</sup> The fact that the exporter is a licensee from the Government and that the manufacturer who manufactures for the purpose of export is obliged to sell only to the licence-holder, by reason of a Government Control Order, does not alter the situation. The licence-holder cannot be deemed to be the agents either of the foreign buyers or of the manufacturers. The sale by the manufacturers to such licensed exporters cannot, therefore, claim exemption under Art. 286 (1) (b).<sup>6</sup> A person who registers himself as a 'dealer' and submits return as such, cannot be regarded as the agent of the exporter in respect of the purchases made by him as a dealer and then sold to the exporter, even though the goods are then shipped to a foreign buyer on the instruction of the exporter, instead of delivering them to the exporter.<sup>7</sup>

## II. *Sale or purchase by transfer of documents of title.*

Sales or purchases effected within the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are also within the exemption conferred by the present sub-clause.

The reason is that the expression 'in the course of' implies a movement and includes transactions taking place while the goods are in transit or movement in the course of export or import. This movement in the course of export out of or import into the territory of India does not commence or terminate until the goods cross the customs frontier.

(a) Of course, so far as the export trade is concerned, where the goods are transported pursuant to a contract of sale already contracted with a foreign buyer and the shipping documents have already been forwarded to him, any further sale of such goods by the Indian seller is impossible, and where the export trade is conducted through representatives or branch offices, the sale by the latter of the exported goods usually takes place abroad and would not then be subjected to tax by the State in India. Hence, the question of imposing sales-tax on transfer of goods in the course of export would not often arise in practice.

(b) But sales or purchases by transfer of shipping documents while the goods are in transit are a characteristic feature of foreign trade and such transactions taking place where the goods are still beyond the customs frontiers of India, are within the exemption provided by the present sub-clause<sup>8</sup>.

## *Illustration.*

A sells certain goods to B, an exporter F.O.B. on the term that B would pay the price to A on presentation of the bill of lading. Held, the sale did not become complete until the price was paid and that could not take place before the goods had actually passed the customs barrier. Hence, it was a sale in the course of export.<sup>9</sup>

III. But the following transactions cannot be said to have taken place 'in the course of import or export' and are not covered by the exemption of cl. (1) (b);

5. *State of Madras v. Gurdiah*, A. 1956 S.C. 158 (161).

6. *State of Mysore v. Mysore Spinning & Mfg. Co.*, A. 1958 S.C. 1002.

7. *Gordhandas v. Banerjee*, A. 1958 S.C. 1006.

8. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R. 53 (94).

9. *Daulatram v. Wadeyar*, A. 1958 Bom. 120.



(a) The last purchase of goods made by the exporter for the purpose of exporting them to implement orders received from a foreign buyer or expected to be received subsequently in the course of business.<sup>9a</sup>

It follows, therefore, that when a merchant in India purchases (for the purpose of export to foreign country) goods from another Indian merchant or manufacturer,<sup>9b</sup> the transaction is a home transaction; but when he resells the goods to a buyer abroad, such resale is an export transaction.

(b) The same reasoning applies to the first sale after import which is a distinct local transaction effected after the goods have crossed the customs frontier, i.e., after the importation of the goods into the country has been completed, and having no integral relation with it.<sup>9c</sup>

#### Illustration.

Cashewnuts are imported into India from East Africa by import traders in Bombay who indent the goods on their own accounts and sell the goods to traders in Travancore-Cochin. The goods are, however, never landed in Bombay but are shipped direct from East Africa to a port in Travancore-Cochin. The shipping documents are made out in the name of the Bombay party as consignees and delivered to them against payment through Bankers at Bombay. The Bombay party clear the goods through their own representatives at the port of destination in the State of Travancore-Cochin and thereafter issue separate delivery orders to the traders in Travancore-Cochin for the respective quantities ordered by each. *Held*, that in this case, no privity is established between the Travancore traders and the African sellers. The goods are imported by the Bombay party as the principals and taken delivery of by them at the port of destination within the State of Travancore-Cochin. The traders in Travancore-Cochin then purchase the goods from the representatives of the Bombay party at that port. The purchases by the Travancore traders are thus local purchases and stand on the same footing as the purchase of local goods from A to B within the same State.

The purchases made by the Travancore traders cannot be held to be purchases 'in the course of import'.<sup>9c</sup>

IV. In order that exemption from sales-tax may be claimed in respect of any transaction of sale or purchase of any goods taking place 'in the course of export or import', it must be established that these goods are the same as are exported.<sup>9a</sup> If any transformation of the goods by any process takes place, the identity is lost and no exemption can be claimed.

#### Illustration.

Merchants in Travancore-Cochin purchase raw nuts from the local market and, after treating them by a special process, export the processed nuts to foreign countries. *Held*, the purchase from the local market is not exempted from the State sales tax under cl. (1) (b) of Art. 286 because—(a) the purchase prior to exportation is not a transaction 'in the course of export'; (b) the goods purchased and the goods exported subsequently are not identical.<sup>9a</sup>

**Cl. (3): Restrictions and conditions in regard to State taxation of sales of goods of special importance in inter-State trade.**

In exercise of the power conferred by this Clause, Parliament has, by s. 14 of the Central Sales Tax Act, 1956 declared certain goods to

9a. *State of T. C. v. Shanmugha Cashewnut Factory*, (1954) S.C.R.

9b. *Daulatram v. Wadeyar*, A. 1958 Bom. 120.

9c. *Gordhandas v. Banerjee*, A. 1958 S.C. 1006.

be of special importance to inter-State trade and commerce, such as coal, cotton, hides and skins, cotton yarn.

The restrictions and conditions subject to which a State may impose sales tax on the sales of such goods taking place within such State are laid down in s. 15<sup>10</sup> of the Act which says—

*"Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:—*

*(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall be levied in respect of the last sale or purchase inside the State and shall not exceed two per cent. of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;*

*(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State."*

#### **'Law imposing a tax'.**

A law dealing with taxation is not necessarily a law 'imposing taxation'. A law would come within the expression only if it creates the liability to pay the tax.<sup>11</sup>

#### **'Sale in the course of inter-State trade and commerce'.**

A sale could be 'in the course of inter-State trade and commerce' only if two conditions occur—(i) a sale of goods, and (ii) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied there can be no sale in the course of inter-State trade and commerce.<sup>12</sup> Movement of goods across a State border is essential for inter-State trade and commerce.<sup>13</sup>

**287.** Save in so far as Parliament may by law otherwise

Exemption from taxes on electricity. provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway,

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as

10. As amended by Act 31 of 1958.

11. *Chettiar & Co. v. Dy. C.T.O.*, A. 1959 Mad. 317.

12. *Bengal Immunity Co. v. State of Bihar*, A. 1955 S.C. 661.

13. *Mukundas v. State of A.P.*, A. 1960 A.P. 298.



aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity or electricity.

**288.** (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

*Exemption from taxation by States in respect of water or electricity in certain cases.*

*Explanation.*—The expression “law of a State in force” in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

**289.** (1) The property and income of a State shall be exempt from Union taxation.

*Exemption of property and income of a State from Union taxation.*

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

**Scope of Art. 289.**—Arts. 285 and 289 provide for the immunity of the property of the Union and the State, from mutual taxation, according to the federal principle. While Art. 285 provides that property of the Union shall be exempted from the State or local taxation, Art. 289 declares that the property and income of a State shall be immune from Union taxation, excepting commercial undertakings

carried on by the State, unless such undertakings are declared by Parliament to be incidental to the ordinary functions of Government.

**290.** Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

- (a) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State ; or
- (b) in the case of a charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

<sup>14</sup>**290A.** *A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund ; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Madras every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin.*

**291.** . . . Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Govern-

Annual payment to certain Devaswom Fund.  
Privy purse sums of Rulers.

14. Inserted by the Constitution (Seventh Amendment) Act, 1956.



ment of the Dominion of India to any Ruler of such State as privy purse—

- (a) such sums shall be charged on, and paid out of, the Consolidated Fund of India ; and
- (b) the sums so paid to any Ruler shall be exempt from all taxes on income.

\* \* \*

## CHAPTER II.—BORROWING.

**292.** The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

**293.** (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

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15. Cl. (2) has been omitted by the Constitution (Seventh Amendment) Act, 1956.

CHAPTER III.—PROPERTY, CONTRACTS, RIGHTS,  
LIABILITIES, OBLIGATIONS AND SUITS.

**294.** As from the commencement of this Constitution—

- (a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and
- (b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

**Cl. (b): Devolution of rights, liabilities and obligations.**

1. The rights, liabilities and obligations of the East India Co. devolved on the Government of India under the Government of India Act, 1935 and these passed on to the Dominion of India and the Provinces (so far as relating to the Dominion of India) under the Indian Independence Act, 1947. Under Art. 294, these pass on to the Union and the States, respectively.

2. It follows that the grant of the right to run a ferry without any interest in lands, appertaining thereto, granted by the East India Co. is binding upon the appropriate State, unless taken away by competent and valid legislation.<sup>16</sup>

**<sup>17</sup>295.** (1) As from the commencement of this Constitution—

- (a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before

16. *Krishan v. State of U. P.*, A. 1957 All. 455.

17. In its application to the State of Jammu and Kashmir, references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e., the 14th May, 1954.



such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

- (b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

**Cl. (1) (b): Rights, liabilities and obligations of Indian States.**

The liability of the State of Madhya Bharat in respect of the Scindia State Railway became the liability of the Government of India after the transfer of the State Railway to the Government of India on 1-4-50. Hence, a suit for wrongful dismissal of an employee of the State Railway before its transfer lies, after the transfer, against the Union of India.<sup>18</sup>

**Cl. (2): 'Subject as aforesaid'.**

This means that only those rights or liabilities are to devolve on the successor Government which were available in favour of or against the previous Government. Thus, where no suit lay against a Ruler for a cause of action, no suit can be brought against the succeeding State under the Constitution in respect of a similar matter taking place prior to the Constitution.<sup>19</sup>

**Cls. (1) (b) and (2).**

(a) If the liability of the Indian State was for a purpose which is included within the Union List, viz., trade with a foreign country, the liability will devolve on the Government of India.<sup>20</sup>

(b) If, however, the liability was for a purpose outside the Union List the liability will devolve on the State which corresponds to that Indian State under the Constitution.<sup>21</sup>

'State in Part B'. —See p. 1, *ante*, and C3, Vol. II, pp. 178-182, 636-641.

18. *Union of India v. Tej Narain*, A. 1957 M.B. 108 (111).

19. *Somchand v. State of Saurashtra*, A. 1953 Sau. 21.

20. *State of Saurashtra v. Vallabhdas*, A. 1956 Sau. 65.

'Indian State'.—See Art. 366 (15), *post*.

'Corresponding Indian State'.

This expression refers, not to the old Indian States which existed in British days, but the new Indian States which were formed by merger or agreement (after the Indian Independence Act, 1947) and as they existed immediately before the commencement of the Constitution,<sup>21</sup> e.g., it refers to the 'United State of Rajasthan and not any of the Covenanting States which formed the United State of Rajasthan.'<sup>22</sup>

**296.** Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union :

Property accruing by escheat or lapse or as *bona vacantia*.  
Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

*Explanation*—In this article, the expressions "Ruler" and "Indian State" have the same meanings as in article 363.

**Bona vacantia.**

The doctrine would be applied to the assets of a dissolved company.<sup>23</sup>

**297.** All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

**298.** The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purposes.

*Power to carry on trade, etc.*  
Provided that—

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one

21. *State of Rajasthan v. Madanswarup*, A. 1960 Raj. 138 (146).

22. *Mandal's Estate*, in re, A. 1959 Cal. 493.

23. Substituted by the Constitution (Seventh Amendment) Act, 1956.



*with respect to which Parliament may make laws, be subject in each State to legislation by the State; and*

*(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.*

**Object of Amendment.**—The original Article has been substituted by the Constitution (Seventh Amendment) Act, 1956, with the following object—

“To make it clear that the Union Government, as well as the State Governments, are competent to carry on any commercial or industrial undertaking, whether or not it is related to a matter within the legislative competence of the Union, or, as the case may be, of the State. Similarly, the holding, acquisition and disposal of property and the making of contracts by the Union or a State could be for any purpose without constitutional impropriety. At the same time, the revised Article provides that this extended executive power of the Union and of the States will be subject, in the former case, to legislation by the State, and in the latter case, to legislation by Parliament.”<sup>24</sup>

#### Scope of Art. 298.

The article, as substituted, is intended to supplement the meaning of ‘executive power’ in arts. 73 and 162, *ante*.

#### Power to carry on trade etc.

Since these functions are expressly declared as included in ‘executive’ power, it is clear that no legislative sanction is necessary for the exercise of these functions.<sup>25</sup> It is thus competent for the Government to take up the business of banking’ or the exploitation of mineral resources in the exercise of its executive power.<sup>1</sup>

**299.** (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the

Contracts.

Governor . . . . . of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor . . . . . by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor . . . . shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

24. Statement of Objects and Reasons.

25. *Kotaiah v. State of A. P.*, A. 1959 A.P. 485 (487).

1. *Tilakram v. Bank of Patala*, A. 1959 Panj. 440 (446).

2. *Kotiah v. State of A.P.*, A. 1959 A.P. 485.

**Rationale behind Art. 299.**

Contracts by Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons. Thus, there should be a definite procedure according to which contracts must be made by its agents, in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant.<sup>3</sup>

**Cl. (1): Formality of contracts on behalf of Government.**

1. The words 'expressed to be made' and the word 'executed' suggest that there must be a deed or a formal written contract executed by a person duly authorised under this Article.<sup>4,5</sup> A contract by a correspondence or an oral contract<sup>6</sup> is, accordingly, not binding upon the Government. The contract also fails if the person who executes it is not authorised in that behalf under the present Article, by the President or Governor as the case may be.

2. It is evident that in order to comply with the requirements of the Article, the contract—

(a) must be executed by a person duly authorised' by the President, or Governor as the case may be;

(b) must be executed by such person 'on behalf of' the President or Governor as the case may be;

(c) must be 'expressed to be made by'<sup>7,8</sup> the President or Governor as the case may be.

**Effects of non-compliance with the requirements of Art. 299(1).**

1. The provisions of this clause are mandatory.<sup>9</sup>

2. If any of the foregoing conditions are not complied with, the contract is not binding on or enforceable against the Government<sup>10,11</sup> though a suit may lie against the officer who made the contract, in his personal capacity<sup>12,14</sup> (if the contract be otherwise valid).

3. But though no suit lies against the Government on the basis of such defective contract, there is authority for the view that the other party to the contract may obtain relief against the Government on the basis of benefit or service received under the agreement, under s. 65<sup>13,15</sup> or 70<sup>16</sup> of the Indian Contract Act, which is founded on equitable principles.

3. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817 (835).

4. *Union of India v. Ramnagina*, (1951) 89 C.L.J. 342 (357).

5. *Prov. of Bengal v. Puri*, (1945) 51 C.W.N. 753; *Perumal v. Prov. of Madras*, A. 1950 Mad. 195.

6. *Dominton of India v. Bhikhras*, A. 1957 Pat. 586 (600).

7. *Purkayastha v. Union of India*, A. 1955 Assam 33 (41, 43); *Perumal v. Prov. of Madras*, A. 1950 Mad. 195.

8. *Brif Lal v. State of U. P.*, A. 1954 All. 393 (397); *U.P. Govt. v. Nanhoo*, A. 1960 All. 421.

9. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817.

10. *S. K. Sen v. State of Bihar*, A. 1960 Pat. 159.

11. *Dharmeswar v. Union of India*, A. 1955 Assam 86 (90).

12. *Pherumal v. Union of India*, A. 1955 S.C. 468 (476).

13. *Purkayastha v. Union of India*, A. 1955 Assam 33 (44).

14. *Chaturbhuj v. Moreswar*, (1954) S.C.R. 817 (834).

15. *Dharmeswar v. Union of India*, A. 1955 Assam 86 (94).

16. *Union of India v. Ramnagina*, (1951) 89 C.L.J. 342 (357).

17. *Dominton of India v. Preeti Kumar*, A. 1958 Pat. 203 (207-9).

18. *Municipal Board v. Bacchu*, (1951) 6 D.L.R. 258 (All.).

19. *Cf. Madura Municipality v. Alagiriswami*, (1939) Mad. 928; A. 1939 Mad. 957.



The claim to restitution or compensation under s. 65 of the Contract Act, however, does not extend to benefits received *after* the agreement is discovered to be void.<sup>20</sup>

4. A contract which contravenes Art. 299 (1) is not enforceable either *by* or *against* the Government. Hence, Government cannot sue the other party on the basis of the defective contract.<sup>21</sup>

5. Even though a contract not in conformity with Art. 299 is not binding upon the Government, Government may by ratification of such contract, make itself liable<sup>22,23</sup> or allow itself to be sued.

But such ratification must be strictly proved.<sup>24</sup> Mere receipt of a benefit under such invalid contract is not sufficient to constitute ratification.<sup>25</sup>

6. But Government cannot itself sue on the invalid agreement on the plea that it has or could have ratified it,<sup>1</sup> though s. 65 of the Contract Act may be relied upon by the Government also.<sup>26</sup>

7. But—

Such contracts are not *void* for collateral purposes,<sup>27</sup> and cannot be impeached in proceedings to which the Government is not a party.<sup>2</sup>

#### Service Contracts.

Bose J. of the Calcutta High Court<sup>3</sup> has held that employment in Government service also comes within the purview of Art. 299 (1) and that, consequently, a person who has not been employed under a contract which complies with the requirements of the Article, has no right enforceable in a Court of law.

Of course, where the appointment takes place under a formal contract, it must comply with the formal requirements of Art. 299, but it would be too much to say that all appointments by the Government must take place by a formal contract, otherwise, they would be invalid. In fact, most of the appointments take place by the issue of a letter of appointment, followed by acceptance. Perhaps it would detract from the principle of 'holding office during pleasure' of the Government (Art. 310), if it be held that there cannot be any appointment without a formal contract. This view of the Author, expressed at p. 417 of Vol. II of the 3rd Edition of the Commentary, now finds support from subsequent decisions<sup>4</sup> which hold that no formal contract is necessary for appointment to the regular service of the Government, whose conditions of service are laid down in the Constitution and the Rules made under Art. 309 and that, outside art. 310 (2), a formal contract would confer no rights upon the employee.

20. *Purakayastha v. Union of India*, A. 1958 Assam 33 (43).

21. *Perumal v. Prov. of Madras*, A. 1950 Mad. 194.

22. *Dominion of India v. Bhikhras*, A. 1957 Pat. 586 (604).

23. *U. P. Govt. v. Nanhoo Lal*, A. 1960 All. 420.

24. *Prov. of W. B. v. Mohanlal*, (1957) 63 C.W.N. 907 (911).

1. It is submitted that observations to the contrary, in *Malamchand v. State*, A. 1960 M.P. 152, require further consideration, for, if non-compliance with Art. 299 (1) enables the Government to plead that the contract is not enforceable against it, Government cannot make it enforceable against the other party by its unilateral option.

2. Cf. *N. C. Coal Co. v. Union of India*, A. 1956 Cal. 138 (142).

3. *Subodh v. O'Callaghan*, A. 1953 Cal. 319; *Lakshmi Narayan v. Puri*, A. 1954 Cal. 335.

4. *Bedi v. Govt. of Patiala*, A. 1953 Pepsu 196; *Ranjit v. State of W. B.*, A. 1958 Cal. 551; *P. N. Sarkar v. State of Bihar*, A. 1960 Pat. 366 (370).

**The defence of non-compliance must be pleaded.**

1. In view of O. VI, r. 8 and O. VIII, r. 2 of the Civil Procedure Code, the question of invalidity of the contract on the ground of non-compliance with Art. 299 will not be allowed to be raised at the hearing unless it is specifically pleaded in the written statement.<sup>5</sup>

2. But where the non-compliance is patent from the allegations in the plaint or the evidence adduced by the plaintiff himself, the Court will not uphold the defective contract simply because the defect has not been pleaded.<sup>6</sup>

**Cl. (2): Personal immunity of officers for Government contracts.**

Excepting the present clause, there is no provision in our Constitution to exempt officials from personal liability for acts done or purported to be done in the exercise of their official duties. The present clause, following English law exempts officials as well as the Executive heads from personal liability for contracts made or executed 'for the purposes of this Constitution', or under any of the Government of India Acts.

It is to be noted that the officer will be personally immune only if the contract duly complies with the formalities laid down in cl. (1) of Art. 299. In short, where the Government is not bound for want of due compliance with Art. 299 (1), the personal liability of the officer who executed the contract remains.

**300.** (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

**Scope of Art. 300: Suits and proceedings by or against the State.**

This Article does not give rise to any cause of action, but merely says that the State can sue or be sued, as a juristic personality, in matters where a suit would lie against the Government had not the Constitution been enacted, subject to legislation by the appropriate Legislature.

5. *Kalyanpur Lime Works v. State of Bihar*, (1954) S.C.R. 958.

6. *Dominion of India v. Bhikharaj*, A. 1957 Pat. 586 (602).



### Contract.

In India, direct suit had been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right.<sup>7</sup> The Government of India Acts (Sec. 30 of the Act of 1919 and Sec. 175 of the Act of 1935) expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution in Art. 299 (1) maintains that position.

Subject to the formalities prescribed by Art. 299 and to statutory conditions or limits, thus, the contractual liability of the State, under our Constitution, is the same as that of an individual under the ordinary law of contract.<sup>8</sup>

### Torts.

The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. As will appear from below, the state of the law is unnecessarily complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation of the sovereignty of the Crown, both of which have become archaic, owing to changes in history and in law.

Following certain observations in the *P. & O. Steam Navigation Co. v. Secy. of State*,<sup>9</sup> Courts in India have, generally, drawn a distinction between the sovereign and non-sovereign functions of the Government and held that the Government could not be sued for torts committed by the Government or its officers in the exercise of its 'sovereign' functions.<sup>10</sup>

Hence, so long as Parliament or the State Legislature does not legislate in the matter, the liability of the Union or a State Government to be sued is to be determined with reference to the law as it stood at the commencement of the Constitution. Owing to the historical developments, again, the pre-Constitution law relating to the subject related back to the position of the East India Co., prior to the Government of India Act, 1935.<sup>11</sup>

Shorn of these technicalities, the liability of the Government to be sued under the existing law may be summarised as follows:

Thus, it has been held—

(A) No action lies against the Government for injury done to an individual in the course of exercise of the *sovereign functions* of the Government, such as the following:

(i) Commandeering goods during war;<sup>12</sup> (ii) making or repairing a military road;<sup>13</sup> (iii) administration of justice;<sup>14</sup> (iv) improper arrest,<sup>15-17</sup> negligence or trespass by Police officers;<sup>18</sup> (v) wrongful

7. Cf. *Rangachari v. Secretary of State*, (1937) 64 I.A. 40; *Venkata v. Secretary of State*, (1937) 64 I.A. 55.

8. *P. C. Biswas v. Union of India*, A. 1956 Assam 85 (90).

9. *P. & O. Steam Navigation Co. v. Secy. of State*, (1861) 5 Bom. H.C.R. App. A.

10. Vide C3, Vol. II, pp. 424-5.

10a. *Kesoram v. Secretary of State*, (1926) 54 Cal. 969.

11. *Secretary of State v. Cockraft*, (1914) 39 Mad. 351.

12. *Mata Prasad v. Secretary of State*, (1929) 5 Luck. 157; *Baleswari Prasad v. Secy. of State*, A. 1937 All. 158.

13. *Gurucharan v. Prov. of Madras*, A. 1944 F.C. 41.

14. *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314; *Ross v. plaintiff, causing him damage*; (vi) negligence of officers of the Court *Secretary of State*, (1913) 37 Mad. 55.

refusal by officers of a Revenue Department to issue licence to the plaintiff, causing him damage;<sup>15</sup> (vi) negligence of officers of the Court of Wards in the administration of an estate under its charge;<sup>16</sup> (vii) wrongs committed by officers in the performance of duties imposed upon them by the Legislature,<sup>17</sup> unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed,<sup>18</sup> or the wrongful act was expressly authorised or ratified by the State;<sup>19, 20</sup> (viii) loss of moveables from Government custody owing to negligence of officers;<sup>21</sup> (ix) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of officer in the exercise of statutory affairs, where Government does not derive any benefit from such transaction,<sup>22, 23</sup> e.g., by a Treasury Officer paying money to a wrong person on a forged cheque owing to negligence in performing his statutory duty to compare the signature;<sup>24</sup> (x) wrongful seizure or confiscation of goods, in the purported exercise of statutory powers; (xi) injury caused by driver of a military car on duty.<sup>25</sup>

(B) I. On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in,<sup>26</sup> such as the following :

(i) Injury due to the negligence of servants of the Government employed in a dockyard<sup>27</sup> or a railway;<sup>28</sup> (ii) trespass upon or damage done to private property in the course of a dispute as to a right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers;<sup>29</sup> (iii) whenever the State has benefited by the wrongful act of its servants whether done under statutory powers or not, the State is liable to be sued for *restitution* of the profits unlawfully made, just as a private owner,<sup>30, 31</sup> e.g., where Government retains property or moneys unlawfully seized by its officers<sup>32</sup> a suit lies against the Government for its recovery,<sup>33</sup> with interest;<sup>34</sup> (iv) defamation contained in a resolution issued by Government;<sup>35</sup> (v) the Rajasthan High Court<sup>36</sup> has awarded

15. *Nobin v. Secretary of State*, (1875) 1 Cal. 11.

16. *Secretary of State v. Sreegovinda*, (1932) 36 C.W.N. 606.

17. *Secretary of State v. Ram*, (1933) 37 C.W.N. 957; *Ross v. Secretary of State*, (1913) 37 Mad. 55; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314 (325); *Dist. Board v. Prov. of Bihar*, A. 1954 Pat. 529.

18. *Secretary of State v. Hari*, (1882) 5 Mad. 273.

19. *Sewkissendas v. Dominion of India*, A. 1957 Cal. 617 (623).

20. *Ram Ghulam v. U. P. Government*, A. 1950 All. 206.

21. *Uday Chand v. Prov. of Bengal*, (1947) 2 Cal. 141.

22. *Dist. Board v. Prov. of Bihar*, A. 1954 Pat. 529.

23. *Union of India v. Ayed Ram*, A. 1958 Pat. 439; *Dist. Board of Bhagalpur v. Prov. of Bihar*, A. 1954 Pat. 529.

24. *Union of India v. Harbans Singh*, A. 1950 Punj. 39.

25. *P. & O. Steam Navigation Co. v. Secy. of State*, (1861) 5 Bom. H.C.R. App. A.

1. Cf. *Rangachari v. Secretary of State*, (1937) 64 I.A. 40; *Venkata v. Secretary of State*, (1937) 64 I.A. 55.

2. *P. C. Biswas v. Union of India*, A. 1956 Assam 85 (90).

3. Unlawful detention of goods by Government Railway [*Ram-brahma v. Dominion of India*, A. 1958 Cal. 183].

4. *Kailas v. Secretary of State*, (1912) 40 Cal. 452; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314.

5. *Wasappa v. Secretary of State*, (1915) 40 Bom. 200.

6. *Jhangir v. Secretary of State*, 6 Bom. L.R. 131.

7. *Vidyawati v. Lohumal*, A. 1957 Raj. 305.



damages against the Government for injury caused to a citizen by negligent driving of a State vehicle while on its way back from a repairing workshop, and while it was not actually engaged in the performance of any governmental function, such as quelling a riot or disturbance or the like.

2. Mukherjea J. in *Prov. of Bombay v. Khushaldas*<sup>8</sup> took the view that whenever the Government does an act, whether commercial or non-commercial, under the sanction of a Municipal law, it should be liable in torts as a private individual.<sup>9</sup>

(C) There are certain actions which cannot possibly lie against the Government. Thus—

Since the State cannot be said to commit a contempt of Court, no proceeding for contempt lies against the State, nor can the State be impleaded as represented by an officer who is alleged to have committed the contempt.<sup>10</sup> The remedy lies against that particular officer.<sup>11</sup>

3. The Government has absolute immunity for 'Acts of State', i.e., acts which are done against aliens, not under the sanction of any municipal law, but in the exercise of the sovereign powers of the State. But the plea of 'act of State' is available only against *aliens* and not against subjects.<sup>12</sup>

4. A statute is not binding on the Government unless expressly named, or by implication.<sup>13</sup>

**Whether the principle of priority of Crown debts can be claimed by Government.**—See under Art. 372, *post*.

## TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

**301.** Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Freedom of trade, commerce and intercourse.

### Object of Art. 301.

The object of the freedom declared by this Article is to ensure that the unity of India may not be broken up by internal barriers.<sup>1</sup>

### Arts. 19(1) (g) and 301.

*Prima facie*, it seems that there is some overlapping between Art. 19 (1) (g) and Art. 301. But the distinction lies in this—

While Art. 19 (1) (g) looks at the freedom of trade from the point

8. *Prov. of Bombay v. Khushaldas*, (1950-51) C.C. 190 (224) : (1950) S.C.R. 621.

9. *Union of India v. Murlidhar*, A. 1952 Assam 141.

10. *Kallas v. Secretary of State*, (1912) 40 Cal. 452; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314; *Union of India v. Ayed Ram*, A. 1958 Pat. 439; *Tarafalul v. S. N. Maitra*, A. 1952 Cal. 919.

11. *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415 (436).

12. *State of Bombay v. Chamarbandgwalla*, A. 1957 S.C. 699 (718).

13. *Director of Rationing v. Corp'n. of Calcutta*, (1960) S.C. [Cr. A. 158/56].

of view of the individual citizen, Art. 301 looks at it from the point of view of the country's trade and commerce as a whole.<sup>2</sup>

While Art. 19 (1) (g) guarantees the right of a citizen to carry on any trade or profession at a particular place, Art. 301 provides for the *free movement* of persons and goods from one place to another, within the territory of India,<sup>3</sup> whether *inter-State* or *intra-State*.<sup>4</sup>

From the point of interference with the freedom it may be said that when a restriction is imposed upon a *person* to carry on any trade or business, it is a restriction upon Art. 19 (1) (g); whereas if any restriction is imposed upon any *trade or business* with reference to *movement* from one place to another, it is an infringement of Art. 301.<sup>5</sup> In other words, the protection given by Art. 301 is a kind of 'territorial protection to trade, commerce and intercourse' which, of course, ensures to the benefit of the individuals who engage in trade or business etc.<sup>6</sup>

Not being a fundamental right, the infringement of Art. 301 cannot be challenged by a petition under Art. 32.

This does not mean, however, that the individual has no remedy if Art. 301 is infringed. Either an individual<sup>7,8</sup> or a State can challenge any legislative or executive action which offends against this Article, by other proceedings.

### 'Trade, commerce'.

The protection offered by this Article is confined to such activities as may be regarded a lawful *trading* activity and does not extend to an activity like gambling, which is *res extra commercium* and cannot be said to be 'trade'.<sup>9,10</sup> It cannot include activities which are so inherently pernicious, such as trafficking in women, hiring of goondas for committing crimes.<sup>11</sup>

### 'Intercourse'.

This word is used to give the freedom declared by Art. 301 the largest import. It thus, includes the freedom to import things for personal or non-commercial use.<sup>12</sup>

### 'Throughout the territory of India'.

These words extend the freedom not only to *inter-State* but also to *intra-State* transaction and movements.<sup>13</sup>

### 'Shall be free'.

1. The freedom guaranteed by Art. 301 is not, however, a fundamental right and cannot be enforced by a petition under Art. 32.<sup>14</sup> It constitutes, however, a limitation upon the powers of the Legislature, subject to the exceptions contained in Arts. 302-4.<sup>15,16</sup>

2. There is no infringement of Art. 301 unless the impugned State action operates to restrict the freedom of trade, commerce and inter-

2. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (713, 718.)

3. *Bapubhai v. State of Bombay*, A. 1956 Bom. 21 (26); *Usman v. State*, A. 1958 M.P. 33 (37).

4. *Saghir Ahmad v. State of U. P.*, A. 1954 All. 257 (274).

5. *Kutti v. State of Madras*, (1954) 1 M.L.J. 117 (131).

6. *Chamarbaugwala v. Union of India*, A. 1957 S.C. 628 (631).

7. *Chobe v. Palnilkar*, A. 1954 Hyd. 207 (F.B.).

8. *George v. State of T. C.*, A. 1954 T.C. 34; *State v. Phillip*, A. 1954 T.C. 257.

9. *Ramchandra v. State of Orissa*, (1956) S.C.R. 28 (42).

10-11. *State of Bombay v. Chamarbaugwala*, A. 1956 Bom. 1 (14).



course *directly*, as distinguished from the ulterior economic or social consequences resulting from it.<sup>12,13</sup> Thus, neither the Union nor a State Legislature is debarred from exercising its legitimate powers of taxation under the appropriate legislative List merely because such taxation (e.g., a tax on the transport or carriage of passengers under Entry 56 of List II) may have an indirect effect on the free flow of traffic.<sup>14</sup> Such taxation should, not, of course, violate the limitations imposed by Arts 303-4.<sup>15,16</sup>

### Restrictions upon the freedom.

The limitations imposed upon inter-State freedom of trade, commerce and intercourse, by the other provisions of Part XIII are—

(a) It is subject to non-discriminatory restrictions imposed by Parliament, in the public interest [Art. 302].

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [Art. 303 (2)].

(c) Reasonable restrictions may be imposed by a State "in the public interest" [Art. 304 (b)].

(d) Non-discriminatory taxes may be imposed by States on imported goods similarly as on intra-State goods [Art 304 (a)].

(e) Restrictions imposed by "existing law" to continue except in so far as provided otherwise by order of the President [Art. 305]. Existing laws relating to any matter referred to in Art. 19 (6) (i) are also protected.

**302.** Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Power of Parliament to impose restrictions on trade, commerce and intercourse.

**303.**<sup>17</sup> (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or

authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any

12. *Fernandez v. State*, A. 1955 T.C. 126.

13. *A. M. S. S. V. M. Co. v. State of Madras*, A. 1954 Mad. 291; *Bhawalka Bros. v. Duni Chand*, A. 1952 Cal. 740 (S.B.).

14. *Barua v. State of Assam*, A. 1955 Assam 249.

15. *Surajmal v. State of Rajasthan*, A. 1954 Raj. 260.

16. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1087).

17. In its application to the State of Jammu and Kashmir in clause (1) of article 303, the words "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule" shall be omitted.

preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

**304.** Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories<sup>18</sup> any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced ; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

**CL. (a) : No discrimination between imported and local goods.**

By this clause, the principle of freedom of inter-State trade and commerce declared in Art. 301 is subordinated to the State power of taxing goods imported from sister States provided only no discrimination is made in favour of similar goods of local origin. Thus, the States in India have full power of imposing what in American State legislation is called the 'use tax', 'gross receipts tax', etc., or *octroi* duty<sup>19</sup> subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State,—although such taxation is undoubtedly calculated to fetter inter-State trade and commerce.<sup>20</sup>

If there is a single area or any class of producers in a State who are exempted from any tax, that tax cannot be levied upon imported goods, and such taxing law must be held to be invalid so far as imported goods are concerned.<sup>21</sup>

It is also immaterial whether similar goods are actually manufactured in the taxing State or not.<sup>22</sup> The State Legislature would be entitled under Art. 304 (a), to tax imported goods only if producers of similar goods within the State would be equally liable to the same tax.

*Illustration.*

Where a State requires dealers who sell goods obtained from outside the State (who are not ordinarily liable to registration under the Act) to get himself registered and after such registration to pay tax

18. Added by Constitution (Seventh Amendment) Act, 1956.

19. *Surajmal v. State of Rajasthan*, A. 1954 Raj. 260.

20. *State of Bombay v. United Motors*, (1953) S.C.R. 1069 (1081).

21. *Siddiq v. M. B. State*, A. 1956 M.B. 214 (218).

22. *State of Bombay v. Chamarbaugwalla*, A. 1956 Bom. 1 (16).



on his sales as a registered dealer, there is a discrimination in respect to goods obtained from outside the State, in contravention of Art. 304(a), whether any goods of like nature are actually produced in the State or not.<sup>23</sup>

**Proviso : Previous assent of President required for State law under cl. (b).**

1. The Proviso says that though a State Legislature is empowered by cl. (b) to impose reasonable restrictions upon the freedom of trade, commerce or intercourse in the public interest, no law or amendment for this purpose may be introduced in the State Legislature without the previous assent of the President.<sup>24</sup>

2. It has been held by the Supreme Court<sup>25</sup> that if previous sanction is not taken, sanction taken after the introduction of the Bill cannot save the state law.<sup>26</sup>

But the attention of the Court was not drawn to Art. 255 (c) under which the subsequent assent of the President to the Bill cures the defect of absence of previous sanction.<sup>27,28</sup>

3. But—

(i) Cl. (b) or the Proviso applies only if a law which imposes the restriction is, in its 'pith and substance' a law with respect to 'trade, commerce or intercourse'.<sup>29,30</sup> Art. 304 (b) cannot, therefore, be applied to test the reasonableness of law to regulate gambling (under Entry 34 of List II<sup>31</sup>).

(ii) There has been a controversy as to whether a taxing law would come within the purview of the Proviso.

(A) The Rajasthan<sup>32</sup> High Court has taken the *prima facie* view that the imposition of a tax by a State, say an octroi duty, acts as an impediment to the movement of goods into that State or the area within which the duty is imposed and that, accordingly, the sanction of the President will be required for introducing such Bill.

(B) But the better view has been taken by the Andhra Pradesh;<sup>33</sup> Kerala;<sup>34</sup> Patna<sup>35</sup> High Courts that cl. (b) is attracted only when a law imposes a restriction upon the freedom of trade and commerce *directly*,<sup>36</sup> and not when trade or commerce is affected *indirectly* as a result of the operation of a law which the Legislature has an independent power to enact, e.g., to impose a sales tax<sup>37</sup> (under Entry 54, List II); or an octroi duty<sup>38</sup> (under Entry 52, List II); or a tax on vehicles<sup>39</sup> (under Entry 57, List II); or a tax on betting and gambling<sup>40</sup> (under Entry 62, List II).

This view finds support from the Supreme Court decision in *State of Bombay v. Chamarbaugwala*.<sup>41</sup>

23. *Bharat Automobiles v. State of Assam*, A. 1957 Assam 1.

24. *Saghir v. State of U. P.*, (1955) 1 S.C.R. 707; *Ahmed v. State of Orissa*, A. 1955 Orissa 184.

25. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (240).

1. *Gauri Shankar v. Jhunjhunu Municipality*, A. 1958 Raj. 192 (194).

2. *State of Bombay v. Chamarbaugwala*, A. 1956 Bom. 1 (17).

3. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (721).

4. *Bengal Immunity v. State of Bihar*, A. 1953 Pat. 87.

5. *Surajmal v. State of Rajasthan*, A. 1954 Raj. 260.

6. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 235 (239).

7. *Parameswaran v. Sub-Magistrate*, A. 1958 Ker. 52; *Damodaran v. State*, A. 1960 Ker. 58 (63).

8. *Bengal Immunity v. State of Bihar*, A. 1953 Pat. 87.

9. *State of Bom. v. Chamarbaugwala*, A. 1957 S.C. 699 (721).

10. *Fernandez v. State*, A. 1955 T. C., 126.

The same result would follow from a construction of the two clauses in Art. 304. While cl. (b) speaks of restrictions on the freedom of trade, cl. (a) speaks of a tax on goods imported from other States. If taxing laws were also viewed as imposing a restriction on trade, a separate clause to deal with them would not have been necessary. It is legitimate from this to infer that taxation is not a restraint on trade for the purposes of Part XIII unless it is discriminatory in its character within the meaning of cl. (a) of Art. 304.

(ii) Nor is the Proviso applicable unless the legislation in question seeks to restrict the passage of persons or goods from one place to another. Part XIII of the Constitution does not apply to restrictions of the right of an individual businessman to carry on business at a particular place, which comes within the scope of Art. 19 (1) (g).<sup>10</sup>

#### Illustration.

The provision in the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, to the effect that the canegrowers of the State would not be entitled to sell their sugarcane to anyone outside the State was held not to be void for contravention of Art. 301 inasmuch as it was a 'reasonable restriction' under Art. 304 (b), for safeguarding the interests of the large body of sugarcane-growers in the State.<sup>11</sup>

(iii) Another exception has been introduced by Art. 305, as amended in 1955, namely, a law providing for State trading, for if Art. 301 is not attracted to a law relating to that matter, it can hardly be urged that such law imposes a restriction upon the 'freedom of trade and commerce.'

#### 'Amendment'.

1. Not only a Bill but also an amendment which seeks to introduce a restriction within the meaning of Art. 304 (b) requires the President's sanction.

2. But where an existing law<sup>12</sup> or an order<sup>13</sup> made under it has already imposed such restrictions, an amendment of the law or the order, in other respects, will not require sanction even though such amendment takes place after the commencement of the Constitution.

**Instances of State Acts invalidated for want of President's sanction :**  
Travancore-Cochin Public Security Measures Act, 1950 (s. 3).<sup>14</sup>

#### 'Reasonable restrictions'.

1. The same tests which are applicable to determine reasonableness under Art. 19 (1) (6) are also applicable to determine reasonableness under Art. 304 (b).<sup>15</sup> The Rajasthan High Court has held<sup>16</sup> that the heaviness of the imposition *per se* is no element to be considered for determining the reasonableness of the restriction.

2. In *State of Bombay v. Chambarbaugwala*,<sup>17</sup> the Supreme Court found it unnecessary to decide whether a 'restriction' in Art. 304 (b) could extend to 'prohibition', because the Court held that inherently vicious or pernicious activities (which the State might reasonably seek to prohibit) were altogether outside the protection of Art. 301.

10. *Bapubhai v. State of Bombay*, A. 1956 Bom. 21 (26).

11. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 303.

12. *Govt. of Mysore v. Mahantha*, A. 1951 Mys. 65.

13. *State v. Philipose*, A. 1954 T.C. 257 (259); *Ulahannan v. State*, A. 1955 T.C. 82 (83).

14. *State of Bombay v. Chambarbaugwala*, A. 1956 Bom. 1 (17).

15. *Arjunsingh v. Teekchand*, A. 1957 Raj. 220 (228).

16. *State of Bombay v. Chambarbaugwala*, A. 1957 S.C. 699 (721).



**305.** Nothing in article 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct ; and *nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause(6) of article 19.*

**Amendment.**—The italicised words have been added by the Constitution (Fourth Amendment) Act, 1955.

**Object of Amendment.**—The object of this amendment has been explained thus—

"A recent judgment of the Supreme Court in *Saghir Ahmed v. the State of U. P.*<sup>16</sup> has raised the question whether an Act providing for a State monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by article 301, but left the question undecided. Clause (6) of article 19 was amended by the Constitution (First Amendment) Act in order to take such State monopolies out of the purview of sub-clause (g) of clause (1) of that article, but no corresponding provision as made in Part XIII of the Constitution with reference to the opening words of article 301. It appears from the judgment of the Supreme Court that notwithstanding the clear authority of Parliament or of a State Legislature to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being "in the public interest" under article 301 or as amounting to a "reasonable restrictions" under article 304 (b). It is considered that any such question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of article 305 to make this clear".<sup>17</sup>

**Effects of amendment.**—The effect of the amendment is to make the U. P. Road Transport Act<sup>18</sup> and similar existing laws,<sup>19</sup> providing for monopoly trading by the State, immune from attack on the ground of contravention of Arts. 301 and 303. Future laws made by the State relating to the same matter are also saved from the operation of Arts. 301 and 303.

#### **Saving of existing law.**

1. This Article saves 'existing laws' which are repugnant to Arts. 301 and 303, subject to orders of the President.

2. An Act passed before commencement of the Constitution is an existing law, even though it is brought into force after the Constitution has come into force. Thus, it has been held that the Madras Commercial Crops Markets Act, 1933 comes under the present article, even

16. *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.

17. Statement of Objects and Reasons.

18. *Jain Transport v. State of U. P.*, A. 1957 All. 320.

19. *Eg.*, Orissa Motor Vehicles (Regulation of State Carriage and Public Carriers' Service) Act, 1947; Orissa Motor Vehicles (Amendment) Act, 1948 [cf. *Ramchandra v. State of Orissa*, (1956) S.C.A. 346 (357)]; Assam Road Transport Act, 1954 [*Bhiman v. State of Assam*, A. 1957 Assam 139].

though the notifications bringing the Act into force were issued after the Constitution came into operation.<sup>20</sup>

3. The Rajasthan High Court<sup>21</sup> has, on the other hand, held that since all the provisions of an existing Act are saved by the present Article until the President otherwise directs, the provision of such an Act conferring a power to make bye-laws (if otherwise valid) is also saved, so that bye-laws can be framed under such Act even *after* the commencement of the Constitution and they cannot be challenged on the ground that the bye-laws themselves do not constitute 'existing laws'.

#### Instances of existing laws saved by Art. 305.

By reason of Art. 305, the following Acts have been held to be valid notwithstanding their repugnancy to Art. 301—

- (i) Motor Vehicles Act, 1939.<sup>22</sup>
- (ii) Defence of India Act, as continued by the Miscellaneous Provisions Act, 1947.<sup>23</sup>
- (iii) M. B. Customs Regulation Ordinance, 1948 and M. B. Customs Regulation Act, 1949.<sup>24</sup>
- (iv) Hyderabad Customs Act (II of 1356F).<sup>25</sup>
- (v) Jaipur Municipal Act, 1943 (s. 77).<sup>1</sup>

#### 306. Omitted.<sup>2-3</sup>

Appointment of authority for carrying out the purposes of articles 301 to 304.

307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

## SERVICES UNDER THE UNION AND THE STATES

### CHAPTER I.—SERVICES.

308. In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu & Kashmir.<sup>1</sup>

20. *Kutli v. The State*, A. 1954 Mad. 621 (631).
21. *Surajmal v. State of Rajasthan*, 1954 Raj. 260 (263).
22. *Motilal v. Uttar Pradesh*, A. 1951 All. 257 (270) 314 F.B.;
- C. S. S. *Motor Service v. State of Madras*, (1952) 2 M.L.J. 894 (914).
23. *Govt. of Mysore v. Mahantha*, A. 1951 Mys. 65.
24. *Usman v. State*, A. 1958 M.P. 33 (39).
25. *Chobe v. Palnitkar*, A. 1954 Hyd. 207.
1. *Surajmal v. State of Rajasthan*, A. 1954 Raj. 260 (263).
2. Omitted by the Constitution (Seventh Amendment) Act, 1956.
3. For the text of the omitted Article, see C3, Vol. II, p. 456.
- I. Substituted for the words "means... Schedule", by the Constitution (Seventh Amendment) Act, 1956.



**309.** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Recruitment and conditions of service of persons serving the Union or a State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor . . . of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

**Art. 309: Recruitment and conditions of service to be regulated by legislation.**

1. Besides laying down certain general provisions, the Constitution does not aim at providing detailed rules for recruitment or conditions of the services of the Union or of the States. That power is left to the respective Legislatures [Entry 70 of List I, and 41 of List II]. The power of appointment belonging to the Executive will thus be subject to legislative control.

2. The Proviso is a transitional provision empowering the Executive to make rules having the force of law, relating to the above matters, until the appropriate Legislatures legislate on the subject. Further, until the powers conferred by the present article are exercised, the existing Rules will continue to be in force, under Art. 313, *post*, in so far as they are not inconsistent with the provisions of the Constitution.

3. This Article is an enabling provision which confers certain powers upon the Legislature and does not impose any duty to legislate with regard to the conditions of service of Government servants,<sup>2</sup> nor prevent the Legislature from laying down such conditions in any general law enacted under some other power.<sup>3</sup>

**'Subject to the provisions of the Constitution'.**

1. The power conferred by Art. 309 is subject to the opening words of the Article which govern not only the power of the Legislature but also the rule-making power conferred by the Proviso. Hence, if any Rule contravenes any of the provisions of the Constitution, e.g., Art 14<sup>4</sup>, 15, 16<sup>4</sup>, 19<sup>4</sup> or 311<sup>4</sup> (1) or 311 (2),<sup>5</sup> the rule shall be void.

2. *Mubarak v. Banerji*, A. 1958 All. 323 (324).

3. *Dhirendranath v. State of Orissa*, A. 1958 Orissa 96 (100).

4. *Raghunadha v. State of Orissa*, A. 1955 Orissa 113 (115).

5. *Krishna v. Chief Supdt.*, (1954) 58 C.W.N. 1026.

6. *Balakdas v. Asstt. Security Officer*, A. 1960 M.P. 183.

7. *Suresh v. Himangshu*, (1951) 55 C.W.N. 605 (610); *Union of India v. Someswar*, (1953) 58 C.W.N. 107; *Subhagchand v. State of Saurashtra*, A. 1954 Sau. 146.

2. On the other hand, the Constitution itself provides the mode of appointment and conditions of service of certain officers in connection with the affairs of the Union and the States, e.g., the Attorney-General. [Art. 76].

3. Similarly, there are other provisions in the Constitution which empower other authorities to make rules relating to the conditions of service of certain classes of public servants, e.g., Art. 146 (2) [relating to officers of the Supreme Court]; Art. 148 (5) [persons serving in the Indian Audit and Accounts Department]; Art. 229 (2) [officers of High Court]. Hence, Art. 309 shall have no application to these classes of Government servants.<sup>8</sup>

4. So far as judicial officers are concerned, the provisions of Art. 309 are to be read subject to Arts. 233-4. The result is, that though the Governor is entitled to make rules under Art. 309, prescribing the conditions of service of such officers, (a) the recruitment of judicial officers (other than district judges) must be made in accordance with the Rules framed under Art. 234, and (b) the appointment of district judges can be made only in accordance with the provisions of Art. 233.<sup>9</sup>

On the other hand, it is competent for the Government to provide in the rules made under Art. 309 (read with Art. 235) that the inquiry into charges made against judicial officers under Art. 311 (2) should be made by the High Court, the final power of award in the punishment being retained by the Government.<sup>10</sup>

### Whether the Rules can be changed retrospectively.

There has been a difference of opinion on this point:

(A) The Assam High Court has held<sup>11</sup> that though the Government has the power to make as well as change the Rules regulating the conditions of service, they cannot be changed in such a manner as to deprive a Government servant of the rights which have already become vested in him. Thus, a retired man would not be affected by any change in the Rules made after his retirement.<sup>12</sup> A change in the Rules cannot, accordingly, bind existing Government servants without their consent, for, the Rules constitute the terms of the contract between the employee and the employer, i.e., the Government, and cannot, accordingly, be changed unilaterally.<sup>13</sup>

(B) P. B. Mukharji J. of the Calcutta High Court<sup>14</sup> has, on the other hand, held that it is one of the implied conditions of employment under the Government that the service shall be governed by the Rules as they are made and modified from time to time, subject, of course, to the condition that such Rules must not contravene any provision of the Constitution. Hence, nothing prevents Government from making Rules under Art. 309, with retrospective effect and thus affect Government servants prejudicially by Rules which did not exist at the time of the employment. To the same effect is the view of the Allahabad High Court<sup>15</sup> which holds that it is competent for the Government to give retrospective effect to a Rule by express words but that in the absence of express words, the Court should not interpret a Rule as retrospective so as to take away vested rights.<sup>16</sup>

8. Cf. *P. K. Bose v. Chief Justice*, (1955) 2 S.C.R. 1331.

9. *Amar Singh v. State of Rajasthan*, A. 1956 Raj. 104 (106).

10. *Ghouse v. State of A.P.*, A. 1959 A.P. 497 (503).

11. *Jogesh v. Union of India*, A. 1955 Assam 17 (21).

12. *Sunder Lal v. State of Punjab*, A. 1957 Punj. 140 (141).

13. *Anil Nath v. Collector of Excise*, A. 1958 Cal. 407 (410).

14. *Pirithnath v. State of U. P.*, A. 1959 All. 169.



If the matter of employment were looked at purely from the contractual point of view, it would be difficult to take such a view and imply a condition that the employee could be affected by any change in the terms of the contract by a unilateral action on the part of the employer.

The rule under the law relating to private employment is that—  
 "It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment any *new* conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged."<sup>15</sup>

There is no reason to hold that employment under the Government is of such a nature that the above general principle should not apply to it, simply because *termination* of the service is at the pleasure of the Government. Termination is only one of the conditions of service, so that the nature of this condition cannot be held to affect the other conditions, by implication. The matter, therefore, deserves further consideration. From the observations of the Supreme Court in *Balakotiah v. Union of India*,<sup>16</sup> it seems that the Court would not favour Service Rules operating with retrospective effect.

#### **How far an executive interpretation of the Rules of Service is binding on the courts.**

As a general rule, courts are not bound by the interpretation given by an administrative authority to a statute or Rules made thereunder.<sup>17, 18</sup>

But in the case of Rules relating to conditions of service, a different consideration arises if the Rules themselves provide that the power of interpreting the Rules shall be in a specified authority, e.g., the President. In such a case, not only do the Rules themselves form a part of the contract of service concerning the Government servants bound by such Rules, but the term as to the interpretation of such Rules also forms part of the contract. Or, otherwise, the Rules as interpreted by the specified authority form the contract and the courts are thus bound to give effect to such interpretation (provided of course, it does not violate any provisions of the Constitution itself).<sup>19</sup>

#### **'Conditions of service'.**

1. Termination of the service is a matter which falls within the scope of this expression.<sup>20</sup>

2. The expression also includes—

(a) Rules relating to a Contributory Provident Fund.<sup>21</sup>

(b) Rules relating to salary or wages of a Government employee, including subsistence allowance during suspension.<sup>21, 22</sup>

#### **'Public services and posts in connection with the affairs of the Union or of any State'.**

This expression includes the officers and members of the staff attached to a High Court, even though the power to appoint them

15. *Laxminarayan v. Nagpur Corpn.*, A. 1955 Nag. 206.

16. *Balakotiah v. Union of India*, (1958) S.C.R. 1052 (1066).

17. *Basanta v. C. E. Engineer*, A. 1958 Cal. 657 (660).

18. *Kesava v. Director of P. & T.*, A. 1958 A.P. 697 (703).

19. *N.W.F. Prov. v. Suraj Narain*, A. 1946 P.C. 112.

20. *Sunil v. Aftt.* (1954) 58 C.W.N. 483 (485).

21. *Thillai Nagarajan v. Fernandez*, (1956) Bom. L.R. 821.

22. *Divisional Supdt. v. Mukund*, A. 1957 Punj. 130.

belongs to the Chief Justice under Art. 229 (1).<sup>23</sup> The power given by Art. 229 (2) to the Chief Justice to make rules to regulate the conditions of service of the High Court staff is made expressly 'subject to the provisions of any law made by the Legislature of a State'. Hence, the rule-making power of the Chief Justice is subject to the laws made under Art. 309.

### Fundamental Rights of Government Servants.

1. The rights guaranteed by Art. 19 (1) are in favour of all 'citizens' which obviously include public servants.

2. It can hardly be contended that Government servants, while entering into a contract of employment under the State, have waived their fundamental rights,<sup>24</sup> since the fundamental rights cannot be the subject matter of waiver.<sup>25, 27</sup>

3. *Prima facie*, therefore, it seems that restrictions upon these rights of the public servants can be curtailed only on the grounds specified in cls. (2)-(6), and to the extent that the restriction is reasonable.

4. But while a public servant possesses the fundamental rights as citizen, the State also possesses, under the Proviso to Art. 309, the power to regulate their 'conditions of service'. Now, the interests of service under the State require efficiency, honesty, impartiality and discipline and like qualities on the part of the public servant. The State has thus the constitutional power to ensure that every public servant possesses these qualities and to prevent any person who lacks these qualities from being in the public service. It seems, therefore, that State regulation of the conditions of service of public servants so as to restrict their fundamental rights will be valid only to the extent that such restriction is reasonably necessary<sup>28</sup> in the interests of efficiency, integrity, impartiality, discipline and the like which have a substantial relation to the conditions of public service. In framing the Rules under Art. 309, the State cannot altogether ignore the Fundamental Rights guaranteed by the Constitution.<sup>24, 2</sup>

Thus, it has been held that—

(a) There is no infringement of Art. 19 (1) (a) by a Rule which prohibits Government servants from discussing the policy or action of the Government.<sup>3</sup>

(b) It is essential in the interest of maintaining the efficiency and integrity of Government servants that they should be prevented from soliciting or receiving monies for any purpose unconnected with the office which they hold under the Government. Hence, r. 6 of the Government Servants' Conduct Rules which provides that—

"Except with the previous sanction of the Government... no Government servant shall ask for or accept or in any way participate in the raising of any subscription or other pecuniary assistance in pursuance of any object whatsoever" does not offend against the right guaranteed by Art. 19 (1) (c) even though it includes a prohibition to solicit monies by sale of tickets to the public for the promotion of a non-political association to join which a Government servant has a fundamental right, for such restriction is a 'reasonable restriction' within the purview of cl. (4) of Art. 19.<sup>29</sup>

(c) Similarly, the validity of a Rule which prohibits a Govern-

23. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.

24. *Chelappan v. State of T. C.*, A. 1957 T.C. 43 (45).

25. *Cf. Ramkishan v. State of Bombay*, A. 1955 S.C. 104 (146).

1. *Bhashahar v. Commr. of I.T.*, A. 1959 S.C. 149.

2. *Lachman v. I. G. P.*, A. 1956 Pepsu 19 (22).

3. *Charko v. State of T. C.*, A. 1957 Ker. 7.

4. *Sethumadhava v. Collector*, A. 1955 Mad. 468 (470).



ment servant from becoming a member of a service association unless the membership of such association is confined to Government servants of a distinct class<sup>5</sup> or the association is recognised<sup>6</sup> by the Government, has been upheld as a reasonable restriction upon the right of association of Government servants.

On the other hand—

1. R. 20 (1) of the Government Servants' Conduct Rules constitutes an 'unreasonable' restriction on the fundamental rights guaranteed by Art. 19 (1) (a), in so far as it prohibits a Government servant from making any public utterance (oral or written) which is "capable of embarrassing the relationship between the Government and its people or any section thereof or its relation with any foreign country . . . ." Such a ground of restriction is vague and is not permissible under Cl. (2) of Art. 19.<sup>7</sup>

2. R. 23 of the Government Servants' Conduct Rules provides that

"No Government servant shall take part in, subscribed in aid of, assist in any way, any political movement in India relating to Indian affairs . . . . Political movement includes any movement or activities tending directly, or indirectly, to excite disaffection against or to embarrass, the Government as by law established."

It has been held<sup>8</sup> that this Rule does not prohibit a Government servant from joining a Union having outsiders as office-bearers. The mere fact of formation of a Union with outsiders cannot be said to be an activity tending to excite disaffection against the Government . . . . The Rule would be infringed only if the Union resorts to activities prohibited by the Rule.

3. Any Rule which requires Government servants to obtain permission of the Government before forming a union or empowers an administrative authority to dissolve a union not conforming with the rules, in void for contravention of Art. 19 (1) (c).<sup>9</sup>

4. Any rule or order which prohibits a Government servant from seeking redress in Court against the Government without prior permission, appears to offend against Arts. 32 and 226, which guarantee to all citizens the right to have the constitutional remedies.<sup>10</sup>

**Remedies for violation of Rules regulating conditions of service.—**

See under Art. 311 (2), *post*.

**310.** (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or an all-India service or holds any post connected with defence of any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service

Tenure of office of persons serving the Union or a State.

5. *Chelappan v. State of T. C.*, A. 1957 T.C. 43.

6. *Divakaran v. State of T. C.*, A. 1958 Ker. 283 (285) [contra *Ramakrishnaiah v. Dt. Board*, A. 1952 Mad. 253.]

7. *Krishna v. Chief Superintendent*, (1954) 58 C.W.N. 1026. [On appeal, it was held that the question of constitutionality of the Rules did not arise on the facts of the case inasmuch as the alleged transgression of the rule took place prior to the commencement of the Constitution: *Chief Supdt. v. Krishna*, (1955) 60 C.W.N. 24 (26).]

8. *Shital v. Dy. A. G.*, A. 1955 All. 623.

9. *Ramakrishnaiah v. Dt. Board*, A. 1952 Mad. 253.

10. *In re Venkataraman*, A. 1957 Mad. 338.

of a State or holds any civil post under a State holds office during the pleasure of the Governor . . .<sup>11</sup> of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor<sup>11</sup> of the State, any contract under which a person, not being a member of a defence service or of an all-India or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, . . .<sup>11</sup> as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abandoned or he is, for reasons not connected with any misconduct on his part, required to vacate the post.

#### Art. 310: Office during pleasure of Government.

1. Cl. (1) of this Article provides that, subject to the other provisions of the Constitution in this behalf, all civil posts under the Government are held at pleasure of the Government under which they are held and are terminable at its will. This right of the Government is, however, subject to the restrictions imposed by Art. 310 (2) and Art. 311 (1) (2).<sup>12,13</sup> Hence, the dismissal of civil servants must comply with the procedure laid down in Art. 311.

2. The office being terminable at the pleasure of the State, there is no limitation as to the grounds<sup>14</sup> upon which the services of a Government servant may be terminated. Once the procedure under Art. 311 (2) has been complied with, the Courts are not entitled to determine whether the ground or the charge upon which Government has proceeded against a Government servant is sufficient to warrant a dismissal.

But a rule, which provides for dismissal on a ground which unreasonably restricts the fundamental rights of a Government servant, may be challenged as unconstitutional (see p. 548, *ante*).

3. The words 'pleasure of the 'President' or 'Governor' ' do not mean that the article is applicable only when a Government servant is dismissed by the President or Governor personally. Under Arts. 53 (1) and 154 (1), executive power of the Union or a State may be exercised by the President or Governor either directly or through officers subordinate to him. Hence, Art. 310 is attracted whenever a person is dismissed by an officer competent to dismiss such person serving under the Union or a State, as the case may be.<sup>14</sup>

#### Whether the pleasure can be fettered by legislation.

Art. 310 (1) provides that all service is held at the pleasure of the President or Governor 'except as provided by this Constitution.'

11. References to 'Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

12. *Parshotam v. Union of India*, A. 1957 S.C. 36 (41).

13. *Khem Chand v. Union of India*, A. 1958 S.C. 300 (304).

14. Cf. *Madhosingh v. State of Bombay*, A. 1960 Bom. 285.

14a. Cf. *Jagannath v. Asstt. Excise Commr.*, A. 1959 All. 771 (774).



From this, the Bombay High Court<sup>12</sup> has held that this pleasure cannot be fettered except by the provisions of Art. 311; in the result, the pleasure cannot be fettered by ordinary legislation. The Court, accordingly, refused relief to an industrial employee of the Government whose services had been terminated in contravention of the provisions of the Industrial Disputes Act, 1947.

**Cl. (1): 'Except as otherwise provided by this Constitution'.**

1. These words refer, *inter alia*, to Arts. 124, 148, 217, 218 and 324 which, respectively, provide that the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except in the manner laid down in those Articles.<sup>13</sup> The holders of these offices, therefore, hold their posts not at the pleasure of the 'President' but 'during good behaviour'.

2. As already stated, cl. (1) of the present Article is to be read subject to the conditions imposed by cls. (1)-(2) of Art. 311.<sup>14</sup>

**Whether Art. 310(1) is controlled by fundamental rights.**

There has been a difference of opinion as to whether the pleasure of the Government to terminate the services of a Government servant is to be exercised subject to the fundamental rights contained in Part III which are applicable to all citizens.

1. As regards Art. 14,—

(A) A Division Bench of the Allahabad<sup>15</sup> High Court has held that Art. 310 being a special provision relating to termination of the services of Government servants, the general provisions of Art. 14 are not applicable to it.

15. *Ravindran v. Patel*, (1956) S.A. 1061/56, referred to in *Shankarlingan v. Union of India*, (1960) 62 Bom. L.R. 1 (5-6).

[This view rests upon the assumption that if the Legislature seeks to impose any condition upon the exercise of the pleasure of the Government that would be *ultra vires* art. 310 (1). But it is competent for the Legislature to legislate with respect to conditions of service under some independent power conferred by the Constitution. Such power, for instance, may be derived from Entry 22 of List III (industrial disputes), as already held by the Supreme Court in *D. N. Banerjee v. Mukherjee*, (1953) S.C.R. 302. The question therefore is —if the Legislature, in exercise of its power to legislate with respect to industrial disputes, imposes fetters upon the power to dismiss and such statute binds the Government, is it open to the Government to urge, nevertheless, that the statute is not binding upon the Government because it contravenes art. 310 (1)? Entry 22 of List III is not a legislative power relating to the services. If it is an independent power (as the Supreme Court has held in the cited case), can it not be said to be an excepting provision of the Constitution within the meaning of art. 310 (1), subject to which the provisions of that article must be read? If any other view is taken, the result will be that the Legislature will be powerless to provide for the settlement of industrial disputes in Government establishments, if that requires the limitation of the power of dismissal as in private establishments.

Another question, which is yet to be decided by our Supreme Court, is whether Government itself can challenge the constitutionality of a statute].

16. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.

17. *Parshotam v. Union of India*, A. 1957 S.C. 36 (41). (1958) S.C.R. 828.

18. *Raj Kishore v. State of U.P.*, A. 1954 All. 343.

A single Judge<sup>19</sup> of the same High Court has differed and held that even though the Government has the power to dismiss an employee on any ground, the order or notification is liable to be challenged on the ground that it is discriminatory.

11. As to Art. 16 (1)—

The Bombay<sup>20</sup> and Patna<sup>21</sup> High Courts have held that the expression 'matters relating to employment' embraces not only the initial stage of appointment but also the matters of promotion and termination of appointment. Hence, if Government adopts a policy of retrenchment of surplus staff in order of seniority, but exempt *political sufferers*, there is a discrimination against those who are retrenched.<sup>22</sup>

A single Judge of the Allahabad<sup>23</sup> High Court has taken the view that the expression referred to has to be read with the words 'to any office' and must, therefore, mean only the matter of appointment to a post and not the termination of the employment. A Division Bench of the Nagpur High Court was also inclined to take that view.<sup>24</sup>

The question was left open by the Supreme Court in the *All India Station Masters' case*.<sup>25</sup>

Of course, even if Art. 16 (1) were attracted it would prohibit class discrimination<sup>26</sup> and not the selection of persons having regard to efficiency or other like conditions for retention in service.<sup>27, 28</sup>

**Whether departmental proceedings can be held against a Government servant relating to the same charge, after he has been exonerated at a previous proceeding.**

It is evident that neither the constitutional provision in Art. 20 (2) nor the principle of *res judicata* is applicable to departmental proceedings so that *prima facie* there is nothing to prevent the Government to proceed against a Government servant departmentally even where he has been exonerated on the same charge by a departmental proceeding previously.

It has, however, been held by the Rajasthan High Court<sup>1</sup> that where Rules have been framed under Art. 309, and such Rules do not provide for holding a second inquiry after one has terminated in favour of the Government servant, Government cannot exercise its pleasure under Art. 310 (1) to hold another inquiry, outside the provisions of the Rules. Of course, it would be in the public interest itself that a Government servant shall not be harassed over and again on the same charges, but to hold that there cannot be, under any circumstances, a second proceeding after one has terminated in favour of the Government servant appears to be an extreme one.

**'Member of a civil service of a State or holds any civil post'.**

This expression includes members of the staff of a High Court.<sup>2</sup>

**'Civil post'.**—See p. 558, *post*.

**Cl. (2): Compensation payable for premature termination of contractual service.**

1. Though all service under the Government is terminable at any

19. *Moinuddin v. State of U.P.*, A. 1960 All. 484 (490).

20. *Pandurang v. Union of India*, A. 1959 Bom. 134.

21. *Sukhmandan v. State of Bihar*, A. 1957 Pat. 617.

22. *Moinuddin v. State of U.P.*, A. 1960 All. 484 (499).

23. *Balbirsingh v. State of M.P.*, A. 1955 Nag. 289.

24. Cf. *All India Station Masters' Association v. General Manager*, A. 1960 S.C. 384 (387).

25. *Banarsidas v. State of U.P.*, (1956) S.C.R. 357 (361).

26. *Dwarkanand v. State of Rajasthan*, A. 1958 Raj. 38 (41).

27. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.



time, the present clause provides for payment of compensation where the service is held under a special contract which provides for such compensation and the service is terminated before the expiry of the contractual period.

2. The present clause is not applicable in the following cases—

- (i) in the case of members of the Defence Services.
- (ii) In the case of members of the all-India Services.
- (iii) In the case of members of a civil service of the Union or of a State.

The scope of this clause is, therefore, very narrow, and is limited to those cases where the post does not belong to any of the regular services and Government is obliged to enter into a special contract for securing the services of a person having special qualifications. But even in these cases, no compensation would be payable under the clause if the service is terminated within the contractual period, on the ground of his *misconduct*. It will be payable only—

(a) if the post is abolished before the expiration of the contractual period; or

(b) if the person is required to vacate his post before the expiry of the contractual period, for reason *unconnected with misconduct*.

3. The provision in cl. (2) is only an enabling provision and empowers the Government to enter into a special contract in certain cases in order to secure the services of a specially qualified person, providing for payment of compensation where no compensation is payable under the doctrine of 'service at the pleasure of the State'. It does not, however, mean that if there is a contract with a specially qualified person, the contract must necessarily contain such a term as to compensation or that in the absence of such a term the contract would be invalid for contravention of Art. 310 (2).<sup>3</sup>

**311.** (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply—

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;
- (b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or
- (c) where the President or Governor . . . <sup>3a</sup>, as the case

3. *Mohan v. Pepsu*, A. 1954 Pepsu 136 (149).

3a. The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

### Scope of Arts. 310 and 311.

1. Art. 311 does not in any way alter to affect the principle that a Government servant holds office at the pleasure of the President or the Governor, as the case may be. Art. 311 only subjects the exercise of that pleasure to the two conditions laid down in this Article.<sup>4</sup> In other words, the provisions of Art. 311 operate as a proviso to Art. 310 (1),<sup>5</sup> in relation to persons holding civil posts.

2. These two conditions are—

(i) that such an employee shall not be *dismissed or removed* by any authority subordinate to that by which he was appointed;

(ii) that such an employee shall not be *dismissed, removed or reduced in rank* until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

The object is to afford protection to a class of persons who otherwise hold their office during pleasure.<sup>6</sup>

3. The Article makes no distinction between permanent and temporary members of the services or between persons holding permanent or temporary posts.<sup>7</sup>

4. If a person's services are terminated or he is reduced in rank in contravention of the conditions and formalities prescribed by Art. 311, he has a cause of action to complain to the Court.<sup>8</sup>

5. Art. 311 has no application—

(a) to persons in the *military service*;<sup>9</sup>

(b) to persons who do not serve under the Union or a State, but under a statutory corporation, such as the Life Insurance Corporation.<sup>10</sup>

### Scope of cl. (1): No dismissal by authority subordinate to appointing authority.

1. This clause applies only if the following conditions are satisfied—

(a) That the person whose services are terminated is a member of a civil service or holds a civil post;

(b) That such termination amounts to 'dismissal' or 'removal' as explained below. Thus cl. (1) need not be complied with where a person is discharged in terms of the conditions of his conduct of service.<sup>11</sup> Similarly, where the penalty awarded is other than dismissal or removal, e.g., reduction in rank, or suspension, it may be awarded by an authority who is empowered in that behalf by the Rules even though it is not the 'appointing authority'.<sup>12</sup>

4. *Prem Beharilal v. State of M. B.*, A. 1954 M.B. 49.

5. *Parshotam v. Union of India*, A. 1958 S.C. 36.

6. *Union of India v. Ramchand*, A. 1955 P.J. 167.

7. *Narayanastwami v. Krishnamurthi*, (1938) 1 M.L.J. 367.

8. *Iswar Narain v. Union of India*, A. 1957 All. 439; *Sharda Prasad v. A. G., U. P.*, A. 1955 All. 496.

9. *Md. Ghouse v. State of Andhra*, A. 1957 S.C. 246 (249).



2. Cl. (1) makes it imperative that the order of dismissal of a civil servant should be made by an authority who is not subordinate to the authority who appointed that civil servant. A dismissal by an officer subordinate to the appointing authority is null and void.<sup>10</sup>

3. Where the order of dismissal is made by an authority subordinate to the appointing authority, the unconstitutionality is not cured by the fact that the order of dismissal is confirmed, on appeal, by the proper authority.<sup>11</sup> On the same principle, the appointing authority cannot delegate his power of dismissal or removal to a subordinate authority, so as to destroy the protection afforded by the Constitution.<sup>12</sup>

4. Read with cl. (2), cl. (1) means that it is the competent authority who must be satisfied that the charges have been proved, determine the tentative punishment and then issue the notice to show cause. Where therefore; the notice to show cause against the proposed punishment is issued by another person, and then the file is passed on to the competent authority for passing the final order, the order is nevertheless invalid.<sup>13</sup>

5. This clause does not, however, require that the dismissal or removal must be ordered by the very same authority who made the appointment or by his direct superior. There is a compliance with the clause if the dismissing authority is not lower in rank or grade than the appointing authority.<sup>14</sup> It follows that dismissal by an authority superior to the appointing authority is not bad.<sup>15</sup>

6. Nor is the dismissal invalid where the order of dismissal is passed by the appointing authority but the order is merely communicated by some subordinate officer.<sup>16</sup>

7. On the other hand, where a minor punishment has been awarded by a subordinate authority, there is nothing to prevent the superior appointing authority from reopening the case and imposing the higher punishment referred to in Art. 311 (1).<sup>17</sup>

8. 'Subordinate' refers to subordination in rank and not in respect of function.<sup>18,19</sup>

#### Illustration.

A was appointed in 1928 by order of the Superintendent of the Government Press. A Government order of 1952 vested the Superintendent's power of appointment and dismissal in the Deputy Superintendent. Held, such delegation contravened Art. 311 (1) and A could not be dismissed by the Deputy Superintendent.<sup>20</sup>

9. The constitutional protection offered by this clause cannot be taken away by rules framed under Art. 309 vesting the power of dismissal in an authority subordinate to the appointing authority.<sup>21, 22, 23</sup> It

10. *N.-W. Frontier Prov. v. Suraj Narain*, A. 1949 P.C. 112; *State of Bihar v. Abdul Majid*, (1954) S.C.R. 786.

11. *Somasundaram v. State of Madras*, A. 1956 Mad. 419 (421).

12. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126 (128).

13. *Krishnagopal v. State*, A. 1960 Orissa 37.

14. *Mahesh Prasad v. State of U. P.*, A. 1955 S.C. 70 (73).

15. *Venkateswarrao v. State of Madras*, A. 1954 Mad. 1043.

16. *Bhojraj v. Saurashtra Government*, A. 1952 San. 40 (42); *Balakrishna v. Union of India*, (1958) S.C.R. 1052 (1066).

17. *Daulat v. State*, A. 1958 Raj. 284.

18. *Mahadev v. Chatterjee*, A. 1954 Pat. 285.

19. *Sobhagmal v. State*, A. 1954 Raj. 207.

20. Cf. also *Hiralal v. State of M. P.*, A. 1954 Nag. 258.

21. *Somasundaram v. State of Madras*, A. 1956 Mad. 419.

22. *Balakrishna v. Asstt. Security Officer*, A. 1960 A.P. 183.

follows that changes in these Rules as regards the appointing authority will not affect the rights of a civil servant under Art. 311 (1), so as to render him liable to be dismissed by an authority lower in rank than the authority by whom he was appointed.<sup>23,24</sup>

But where the post of the appointing authority was temporary and is abolished and the Department reorganised, the power of dismissal may be exercised by that officer in the reorganised Department who possesses the power to appoint in like cases.<sup>25</sup> Similar situation arises where an appointing authority is substituted by another by law,<sup>26</sup> but not so where only the designation of the officers is changed.<sup>27,28</sup>

### Appointing authority.

1. 'Appointing authority' means the authority which appointed the officer to the service which has been terminated. Thus,

(a) Where on a change in the administration, the previous service is terminated and a fresh appointment is made, the 'appointing authority' thereafter is the officer who makes the fresh appointment.<sup>29</sup>

(b) If, however the previous service is continued by an order of the new administration, the appointing authority is the authority who corresponds to the authority who make the initial appointment.<sup>30</sup>

Thus, in the case of officers of the Indian States who continue in service after the integration of the States<sup>31,32</sup> or of the Railways which were taken over by the Government of India in 1944,<sup>33</sup> the appointing authority is that authority which appointed<sup>34</sup> or could have appointed the officer in question to the post which he held on 26-1-50 or at the time of the taking over.<sup>35</sup>

(c) In the absence of statutory rules to the contrary, when an officer is deputed from one State to another he is deemed to remain on the establishment of the parent State as regards disciplinary matters.<sup>36</sup>

2. In order to ascertain who was the 'appointing authority' for the purposes of application of Art. 311 (1), the formal document on the basis of which the civil servant holds his appointment must be looked into.

### Illustration.

The Post Master-General wrote to the Petitioner that he had passed the Competitive Examination and that his name had been brought on the list of approved candidates for appointment as a Clerk in Tirhut Division and that "he will get the appointment letter from the Superintendent of Post Offices, Tirhut Division".

Subsequently, the Petitioner got the letter of appointment from the Superintendent, Tirhut Division, appointing him as a Clerk with effect from a specified date and directing him to join at a particular station.

Held, it was the Superintendent of Post Offices, Tirhut Division and not the Post Master-General, who was the appointing authority in this case and that, accordingly, an order of removal by the Superintendent could not be challenged under Art. 311 (1).<sup>37</sup>

23-24. *Balakdas v. Asstl. Security Officer*, A. 1960 M.P. 183.

25. *Dulal v. Bose*, A. 1955 Cal. 356 (359).

1. *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (249).

2. *Qudwat v. G. G. in Council*, A. 1953 All. 17.

3. *Rama Iyer v. Union of India*, A. 1957 Ker. 1 (2); *Ramchandra v. D. I. G.*, A. 1957 M.P. 126 (130).

4. *Sobhagmal v. State of Rajasthan*, A. 1954 Raj. 207.

5. *Ghanshyam v. Saigal*, A. 1956 V.P. 23.

6. *Jageram v. State of M. P.*, A. 1953 Nag. 160 (162).

7. *Kamlacharan v. Post Master-General*, A. 1955 Pat. 381 (384).



Hence, when a person is, in fact, appointed by an authority superior to the authority who is entitled, under the Departmental rules, to appoint that person, he can be dismissed only by that authority who had, in fact, ordered that appointment and not the authority empowered by the rules.<sup>8</sup>

3. The appointing authority referred to in Art. 311 (1) means the authority who appointed the Government servant to the post from which he has been dismissed or removed. He may be an authority other than the authority who made the order of initial appointment of the employee concerned.<sup>9</sup>

#### Illustrations.

(i) The petitioner was appointed in 1951 as a temporary peon by the Additional Chief Engineer, but he was appointed in 1953 on a permanent basis by the Divisional Engineer. *Held*, that the Divisional Engineer was the appointing authority for the purpose of removing him in 1955.<sup>10</sup>

(ii) When a Probationer is confirmed and substantively appointed to the post he was holding as a Probationer, it is the confirming authority who becomes the appointing authority in respect of his substantive appointment.<sup>11</sup>

But if it is not a new appointment but a *transfer* from one Department to another no officer who is subordinate in rank to the appointing authority can dismiss him; e.g., a person appointed by the Commissioner of Excise cannot, on transfer to the Prohibition Department, be dismissed by the District Prohibition Officer who holds the rank of an Assistant Excise Commissioner.<sup>12</sup>

#### The power to inquire into the charges may be delegated.

1. The power to appoint or dismiss an officer is an administrative and not a judicial power notwithstanding the fact that an opportunity to show cause and an inquiry simulating judicial standards have to precede the exercise of the power to dismiss. Hence, it is open to the dismissing authority to take the assistance of some subordinate authority in the exercise of the power, e.g., asking him to *enquire* and *report*, provided that the ultimate responsibility for the exercise of the power to dismiss remains with the person who is entitled to dismiss under cl. (1) of this Article.<sup>13</sup> It is also competent for the Government to set up a statutory tribunal for the purpose of making such inquiries.<sup>14</sup>

2. What clause (1) requires is that the order of dismissal or removal must be made by an authority not subordinate to the appointing authority. It does not require that the order *initiating the inquiry* or the inquiry itself must be made by the appointing authority himself or by some person not subordinate to him.<sup>15</sup> But cl. (1), when read with cl. (2), implies that it is the dismissing authority himself who has to issue the notice to show cause contemplated by cl. (2) and

8. *Somasundaram v. State of Madras*, A. 1956 Mad. 419 (421).

9. *Sobhagmal v. State*, A. 1954 Raj. 207.

10. *Sadhuram v. Engineer*, A. 1957 M.P. 52 (53).

11. *Nand Shankar v. State of Rajasthan*, A. 1957 Raj. 148.

12. *Krishna Murthy v. State of Andhra*, A. 1960 A.P. 29.

13. *Pradyat v. Chief Justice*, A. 1956 S.C. 285.

14. Cf. *Andhra Civil Service (Disciplinary Proceedings Tribunals) Rules, 1953* [*Ghousie v. State of A.P.*, A. 1959 A.P. 497 (501)].

15. Cf. *Jyotinath v. State of Assam*, A. 1955 Assam 171.

to consider the cause shown, before making the order of dismissal or removal.<sup>16</sup> The 'appointing authority' must not only decide the measure of punishment but also the primary question of guilt or innocence.<sup>17</sup> The findings of the enquiry officer must not be taken as final.<sup>18</sup>

3. Though the principle that a prosecutor cannot be a Judge is not strictly applicable to a departmental inquiry and it is competent to a person who issues a notice of inquiry to make the inquiry himself, it would be a violation of the principle of natural justice if the officer selected for inquiry is the person against whom the person charged has made allegations and who is, accordingly, interested to bring the guilt home to the accused at any cost.<sup>19, 20</sup>

#### 'No person who holds a civil post'.

The provisions of Art. 311 extend to all persons holding a civil post under the Union or a State, including members of the all-India and State Service. Members of the Defence Services are thus excluded from the scope of this Article, but not Police officers<sup>21</sup>.

#### 'Civil post'.

1. The expression 'civil post', *prima facie*, means an appointment or office on the civil side of the administration as distinguished from a post under the Defence Forces.<sup>22</sup> The only persons who are excluded from the purview of Art. 311 (1) [which is in the nature of an exception to the general provision in Art. 130 (1)] are—(a) members of Defence Services and (b) persons holding any post connected with defence.

2. All persons, excepting the above two classes, who hold any post under the Union or of a State, hold a civil post.<sup>23</sup> It is immaterial whether the employee is a member of any of the civil services or whether the Civil Service Rules are applicable to him or not.<sup>24</sup> Similarly, whether remuneration is paid or not is immaterial,<sup>25, 26</sup> provided the person has been employed by the Union or a State to a post, for the discharge of public duties, not connected with defence. The expression is wide enough to include all such employees, whether permanent or temporary,<sup>27</sup> or on probation,<sup>28</sup> or on officiating basis.<sup>29</sup>

3. Thus, it has been held that the following persons hold a 'civil post' within the meaning of the present Article—

(i) Members of the Police forces.<sup>30, 31</sup>

(ii) a Special Constable appointed under the Calcutta Suburban Police Act, 1866.<sup>32</sup>

16. This view, expressed at p. 436 of the First (ed) of this book, now finds support from *Garewal v. State of Punjab*, A. 1959 S.C. 512 (519).

17. *Neelakantha v. State of Kerala*, A. 1960 Ker. 279; *Jagarao v. State of Madras*, A. 1957 Andhra 197 (see p. 584, post); *Sreedharalah v. D. S. P.*, A. 1960 A.P. 473 (476).

18. *Choudhury v. Union of India*, A. 1956 Cal. 662.

19. *K. S. Rao* (21st April 1961) V. *Prabodipada H. S. Das* A.

20. *Ramgopal v. Radhakrishnan*, A. 1956 Nag. 162 (164).

21. *Brojo Gopal v. Commr. of Police*, (1955) 59 C.W.N. 628 (630).

22. *Oldwai v. G.-G. in Council*, A. 1953 All. 17 (21).

23. *Nagendra v. Commrs.*, A. 1955 Cal. 56 (58); *Brajnandan v. State of Bihar*, A. 1955 Pat. 353 (356).

24. *Rames v. Prov. Bengal*, (1953) 57 C.W.N. 767 (775); *Isher Das v. Pepsu*, A. 1952 Pepsu 148; *Jayduti Prasad v. State of U. P.*, A. 1951 All. 793 (794).

25. *Parshotam v. Union of India*, A. 1958 S.C. 36.

1. *Suresh v. Himangshu*, (1951) 55 C.W.N. 605 (610).

2. *Brojo Gopal v. Commr. of Police*, (1955) 59 C.W.N. 628.



- (iii) the Manager of a Bank owned by a State;<sup>3</sup>
- (iv) a Home Guard appointed under the C. P. & Berar Home Guards Act;<sup>4</sup>
- (v) A General Manager of Court of Wards;<sup>5</sup>
- (iv) Officers appointed by a High Court.<sup>6</sup>
- (v) Officers appointed by the Government to a Municipal body which the Government has taken over.<sup>7</sup> Where, however, the Municipality is not superseded by the Government, the mere fact that an employee of the Municipality is appointed by the Government under statutory powers, does not make the Municipal employee a State employee.<sup>8</sup>

4. On the other hand,—

(a) There cannot be a 'civil post' unless there is some post or office which exists apart from the person who is employed. Thus, it has been held that the following employees do not hold a 'civil post'—

- (i) A member of a contingency staff which is casually appointed.<sup>9</sup>
- (ii) Chaudharis or agents for collection of land revenue appointed under the Land Revenue Act of Bikaner.<sup>10</sup>
- (b) Neither Art. 310 nor 311 is applicable unless the civil post is held under the Union or a State Government.

The real test for determining whether a person is holding a 'civil post' under the State is not whether he is paid out of the State funds but whether the post is held under the control of the State,<sup>11</sup> and whether the functions performed by him are those of the State.<sup>12</sup> Thus, the employees of the following authorities do not hold a civil post within the meaning of Arts. 310-11, even though their appointment may have been made by a Government under statutory powers;<sup>13</sup>

(i) A statutory corporation, such as the Damodar Valley Corporation;<sup>14</sup> the Calcutta Port Trust;<sup>15</sup> a State Co-operative Bank;<sup>16</sup> the State Bank of India;<sup>17</sup> a District Board;<sup>18</sup> an Improvement Trust;<sup>19</sup> a State Co-operative Bank.<sup>20</sup>

(ii) A company, the shares of which are wholly owned by the Government.<sup>21</sup>

3. *Mohan v. Pepsu*, A. 1954 Pepsu 136 (139).

4. *Sher Singh v. State of M. P.*, A. 1955 Nag. 175.

5. *Sarkar v. State of Bihar*, A. 1960 Pat. 366 (369).

6. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331.

7. *Prem Prakash v. State of Punjab*, A. 1954 Punj. 255.

8. *State of Punjab v. Prem Prakash*, A. 1957 Punj. 219; *Mangal Sain v. State of Punjab*, A. 1952 Punj. 58.

9. *Kartar Singh v. Pepsu*, A. 1955 Pepsu 25.

10. *Sher Singh v. State of Rajasthan* A. 1956 Raj. 110 (111).

11. *Lachmi v. Military Secretary*, A. 1956 Pat. 398.

12. *Ahmad v. Improvement Trust*, A. 1958 All. 353 (360). F.B.

13. *State of Punjab v. Prem Prakash*, A. 1957 Punj. 219.

14. *Damodar Valley Corp. v. Provat*, (1956) 60 C.W.N. 1023.

15. *Nagendra v. Commissioner Port Trust*, A. 1955 Cal. 56.

16. *Chaturbhuj v. Bihar State Co-operative Bank*, A. 1955 Pat.

223.

17. *Baleshwar v. Agent, State Bank*, A. 1958 Pat. 418 (419).

18. *Srinivasan v. Dist. Board, Coimbatore*, A. 1958 Mad. 211;

*Krishori Lal v. State of Punjab*, A. 1958 Punj. 402 (404).

19. *Kumaran v. State of T. C.*, A. 1952 T.C. 264.

20. *Subodh v. Shudri Fertilisers*, A. 1957 Pat. 10; *Bindraban v. State of H. P.*, A. 1953 H.P. 103; *Hanumanthappa v. Special Officer*, A. 1960 A.P. 342.

21. *Rangnath v. Dt. Board*, A. 1957 Pat. 333.

(iii) A District Board;<sup>21</sup> a Municipality (unless taken over by the Government),<sup>22</sup> even when the appointment of the employee has been made by the Government under statutory power, upon the failure of the Municipality to make an appointment within the time specified by the statute.<sup>23</sup>

(iv) An officer of a Panchayat under the Madras Village Panchayats Act, 1950.<sup>24,25</sup>

(v) A lawyer engaged as a Government Advocate or standing counsel for a certain period at a monthly remuneration, with liberty of private practice.<sup>1</sup>

#### Members of Defence services.

1. Under Art. 310, members of the Defence services hold office during pleasure of the President but they are not entitled to the protection offered by Art. 311.<sup>2</sup>

2. *Mandamus* may however lie, for violation of the provisions of the Army Act or of Rules having a statutory basis, but not Rules and Regulations which are non-statutory and are in the nature of instructions for the guidance of the Authorities.<sup>3</sup>

#### Civilians in Defence Establishments.

It has been held that civilians who hold posts 'connected with defence', cannot be said to hold 'civil post' under the Union, whether the Army Act extends to them' or not.<sup>4</sup> Hence, though Art. 310 does, Art. 311 does not apply to them.<sup>4,5</sup>

#### Position of employees of the erstwhile Indian States.

Upon the merger or integration of the Indian States with India, the engagements between the Indian States and their servants lapsed and even there were terms safeguarding the rights of such servants in the Merger Agreements between such States and India, such terms were not enforceable at the instance of such servants in any municipal court.<sup>6</sup> It was, therefore, at the option of the State with which the Indian State was merged, to recognize the rights of such employees or not. But there must be some stage at which this option of the latter Government has to be exercised. The option is to absorb such servants in the new Government or not. After absorbing them in the new service, the latter Government cannot take any action against them which amounts to dismissal, removal or reduction in rank, without complying with Art. 311.<sup>7</sup>

#### Broad classification of civil servants.

1. A permanent post means a post carrying a definite rate of pay sanctioned without a limit of time.<sup>8</sup> A temporary post means a post carrying a definite rate of pay sanctioned for a limited time.<sup>9</sup> The

22. *Mangal Sain v. State of Punjab*, A. 1952 Punj. 58.

23. *Kishori Lal v. State of Punjab*, A. 1958 Punj. 402 (404).

24. *Srinivasan v. Coimbatore Dt. Board*, A. 1958 Mad. 211.

25. *Yagandhra v. Govt. of Andhra*, A. 1950 A.P. 506.

1. *State of Rajasthan v. Madanswarup*, A. 1960 Raj. 138.

2. *Union of India v. Ramchand*, A. 1955 Punj. 166.

3. *Chittoor v. State of T. C.*, A. 1953 T.C. 140.

4. *Kapoor Singh v. Union of India*, A. 1960 M.P. 119.

5. *Tara Singh v. Union of India*, A. 1960 Bom. 101.

6. *Dassmal v. Union of India*, A. 1956 Punj. 42.

7. *Subodh v. O'Callaghan*, A. 1956 Cal. 532; *Atindra v. Gillot*, A. 1955 Cal. 543.

8. Cf. *Amar Singh v. State of Rajasthan*, A. 1958 S.C. 228.

9. *Jogannath v. State of M. P.*, A. 1959 M.P. 136.

10. F. R. 9 (22).

11. F. R. 9 (30).



tenures of a temporary post may be for a certain specified period or for a year and renewed from year to year.

2. The appointment of a Government servant to a permanent post may be *substantive* or on *probation* or on an *officiating* basis. A *substantive* appointment to a permanent post confers normally on the servant so appointed a substantive right to the post called a 'lien'.<sup>12</sup> An appointment to a permanent post on *probation* means that the servant so appointed is taken on trial. The period of probation may be for a fixed period or for an unspecified period. An appointment to *officiate* in a permanent post is usually made when the incumbent substantively holding the post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. In the case of an appointment on probation or on an officiating basis, thus, the servant so appointed does not acquire any substantive right to the post, even though the post itself be permanent, and it is an implied term of such appointment that it may be terminable at any time.

3. An appointment to a temporary post may likewise be substantive or on probation or on an officiating basis. The incidents of an appointment on probation or on an officiating basis are similar to those just discussed, relating to similar appointments to permanent posts.

A substantive appointment to a temporary post gives no lien or right to hold the post except where the appointment is for a *certain specified period*, in which case, the servant acquires a right to hold his post for the specified period.<sup>13</sup>

4. The Central Civil Services (Temporary Services) Rules, 1949, has conferred a security of tenure upon a class of temporary Government servants by creating a 'quasi-permanent service'. According to r. 3 of these Rules, a Government servant shall be deemed to be in quasi-permanent service—

"(i) If he has been in continuous Government service for more than three years; and

(ii) If the appointing authority, being satisfied as to his suitability ... for employment in a quasi-permanent capacity, has issued a declaration to that effect..."

A declaration under r. 3 is essential before a person's service can be regarded as quasi-permanent<sup>14</sup> and the quasi-permanency takes effect from the date of the declaration [r. 2 (b)].

The security of such persons is laid down in r. 6 thus—

"The service of a Government servant in quasi-permanent service shall be liable to termination :

(i) in the same circumstances and in the same manner as a Government servant in permanent service; or

(ii) when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service;

Provided that the service of a Government servant in quasi-permanent service shall not be liable to termination under cl. (ii) so long as any post of the same grade and under the same appointing authority as the specified post held by him, continues to be held by a Government servant not in permanent or quasi-permanent service...."

Thus, as soon as a Government servant's service ripens into a quasi-permanent service, he acquires a right to his post even though

12. F. R. 9 (13).

13. *Srinivasan v. Union of India*, A. 1958 S.C. 419 (426) : [1958] S.C.R. 1295.

his initial appointment was temporary.<sup>14</sup> But the 'reduction' referred to in r. 6 (ii) is not necessarily confined to the abolition of posts but includes the keeping of certain posts in abeyance and the 'certificate' referred to in the same clause may be given by the appointing authority by means of a memorandum instead of by a formal order.<sup>15</sup>

#### CL. (2): When does it come into operation.

1. It is now settled that Art. 311 (2) is attracted only when a civil servant is 'reduced in rank'; or dismissed or removed (that is to say, his services are terminated), before the normal period of his service and against his will, by way of penalty.<sup>16</sup>

Two conditions<sup>17,18</sup> are essential for the application of this provision, viz., that—

(a) the action proposed to be taken against the Government servant is by way of punishment;

(b) it will entail forfeiture of the benefits already earned by him.

(a) Where a person's services are sought to be terminated on the expiry of the term for which he was appointed, or at the expiry of the period of notice by which his services could be terminated according to the contract of his employment, there is no penalty involved, and Art. 311 (2) has, accordingly, no application. Similarly, where a Government servant does not incur any penalty, in the shape of loss of benefits already earned by past service, e.g., in the case of compulsory retirement, Art. 311 (2) is not attracted.<sup>19</sup>

(b) Secondly, Art. 311 (2) is not attracted when any other punishment is sought to be awarded against a civil servant. Thus, r. 49 of the existing Civil Services (Classification, Control and Appeal) Rules provide for a number of different penalties—(a) Censure; (b) Withholding increment or promotion; (c) Reduction to a lower post or time-scale; (d) Recovery from pay of a part or the whole of any pecuniary loss caused to Government by negligence or breach of orders; (e) Suspension; (f) Removal from service; (g) Dismissed.

Of these Art. 311 (2) comes into operation only when any of the three penalties,—dismissal, removal or reduction in rank is sought to be imposed.<sup>20</sup>

Nor is the Article attracted where the Government servant is sought to be penalised in any other manner, e.g., by reduction of his pension.<sup>21</sup>

2. There has been a prolonged controversy as to when a penal element may be said to be involved in a termination of service so as to amount to a 'dismissal' or 'removal' within the meaning of Art. 311 (2).

(f) The Supreme Court<sup>22</sup> has now settled the controversy by drawing a distinction between two classes of Government servants, viz., (a) those who have a right to or lien upon the post held by them; and (b) those who have no such right.

A. Where a Government servant has the right to hold a post either according to contract or the conditions of his service, the mere fact of termination of his service will be deemed to be penal and

14. *Parshotam v. Union of India*, A. 1958 S.C. 36.

15. *Srinivasan v. Union of India*, A. 1958 S.C. 419.

16. *Satischandra v. Union of India*, (1953) S.C.R. 655.

17. *Shyam Lal v. State of U. P.*, 1954 S.C.R. 476.

18. *State of Bombay v. Doshi*, A. 1957 S.C. 982.

19. *Balakrishnan v. Union of India*, A. 1958 S.C. 232.

20. *Narasimhachar v. State of Mysore*, A. 1960 S.C. 247 (251).



Art. 311 (2) will be attracted, whether such termination takes place, assigning any reason or not. It follows, therefore, that the services of the following classes of Government servants cannot be terminated without compliance with Art. 311 (2) :

(i) Termination of the services of a Government servant holding a permanent post, substantively,—prior to the age of superannuation.

(ii) Premature termination of the services of a Government servant holding a temporary post for a fixed term.

(iii) Termination of the services of persons in 'quasi-permanent service otherwise than according to r. 6 of the Central Civil Services (Temporary Services) Rules, 1949.

But even in the above cases, Art. 311 (2) will *not* be attracted if (a) Government has a right to discharge or retire the Government servant under the conditions of his service or terms of a contract, and (b) such discharge or retirement does not involve any *penal* consequence by way of loss of salary, allowance, pension or other benefits *already acquired by his past services*.<sup>19,21</sup>

In any case, the *motive* behind the order is immaterial.<sup>20</sup>

(B) Except in the three classes of cases specified above, a Government servant has no right to the post held by him, e.g., when a person is appointed to a post on probation or in an officiating capacity, or to hold a temporary post other than for a fixed term (and he does not attain the status of quasi-permanent service), the termination of his service at any time will not, *prima facie*, attract Art. 311 (2), because by the very term of his employment, express or implied, the service was terminable at any time so that the termination cannot be deemed to be by way of a punishment.

But even in this class of cases, Art. 311 (2) would be attracted, if the Government takes the view that a simple termination of service is not enough and that the Government servant deserves punishment. The two conditions necessary for the application of Art. 311 (2) in such cases are—

(a) That such punishment is intended to be awarded on the ground of the Government servant's misconduct, inefficiency, negligence and the like.<sup>21</sup>

(b) That the Government intends to inflict *penal* consequences upon the Government servant, by way of loss of benefits *already acquired* by him, or loss of seniority or chances of future promotion in his substantive rank (if any).

(a) It is now *settled*<sup>22</sup> that a termination is intended to be penal so as to attract the operation of Art. 311, not only where it is imposed for some misconduct,<sup>23</sup> but also where it is imposed *on some ground which is capable of being explained*,<sup>24</sup> that is to say, against which it is possible for the Government servant to show cause, Art. 311 (2) is attracted, e.g., where the service is terminated on ground of inefficiency,<sup>25</sup> physical or mental incapacity,<sup>26</sup> lack of will<sup>27</sup> or negligence<sup>28</sup> to discharge the duties of the office.

But no penal element is involved where the appointment was not *valid*, e.g., where it was made without consulting the Public Service Commission and it is sought to be terminated on that ground alone.<sup>1</sup>

21. *State of Bombay v. Doshi*, A. 1957 S.C. 892.

22. *Shyamal v. State of U. P.*, (1955) S.C.R. 26 (41).

23. *Bejoy Chand v. State of Assam*, A. 1954 Assam 12 (15).

24. *Union of India v. Someswar*, (1951) 58 C.W.N. 107; *Fakir v. Chakravarti*, (1954) 58 C.W.N. 336 (341).

25. *Ishar Das v. State of Pepsu*, A. 1952 Pepsu 148.

1. *Visheshwar v. S. T. A.*, A. 1955 Nag. 163.

(b) On the other hand, where the *consequences* are not penal, it is immaterial that the termination has taken place as a result of allegations or imputations against the Government servant.<sup>2</sup>

### Burden of Proof.

The burden of proving that the order of termination of the Petitioner's services is *penal*, in the sense explained above, is on the Petitioner.

### 'Dismissed or removed'.

1. According to the Departmental Rules, there is some difference between dismissal and removal, as to their consequences. Thus, while a person 'dismissed' is ineligible for re-employment under the Government, no such disqualification attaches to a person 'removed'.<sup>3</sup> An order that a person's 'services be dispensed with' amounts to an order of removal.<sup>4</sup>

2. But from the constitutional standpoint, they stand on the same footing, two elements being common to both:

(a) Both are *penalties* awarded on the ground that the conduct of the Government servant is blameworthy or deficient<sup>5</sup> in some respect.

(b) Both entail penal consequences, such as the forfeiture of the right to salary, allowances or pension already acquired, for *past services*.<sup>6</sup> [Vide F. R. 52].

3. As would appear from the decision of the Supreme Court in *Parshotam v. Union of India*,<sup>7</sup> the term actually used in the order terminating the officer's services is not conclusive. Words such as 'discharged' or 'retrenched' may constitute 'dismissal' or 'removal', if the order entails *penal consequences*, as referred to above.

Thus, where an order of reinstatement had the effect of making the Petitioner a permanent civil servant, a cancellation of that order would constitute a 'removal' so as to attract Art. 311 (2).<sup>8</sup>

4. For the same reason, it is not the motive<sup>9</sup> behind the order which is material, but the penal consequences, to determine whether Art. 311 is attracted.

5. It is also clear that in order to attract Art. 311 (2), the termination of the services must be *against the will* of the civil servant. The Article has no application where it is the result of his voluntary act, e.g., where he applies for leave preparatory to retirement and that application is granted<sup>10</sup> or if, after having attained the age of 35, a ministerial officer confesses his inability to continue in service any longer and seeks permission to retire and that application is granted. Of course, before the permission to retire is *granted*, the officer may *revoke* his prayer for permission to retire and then the normal rule would again come into operation if the Government wants to retire him

2. *Gurdip v. State of Punjab*, A. 1960 Punj. 126 (129).

3. *Satis Anand v. Union of India*, A. 1953 S.C. 250 (252; see also r. 49 (vi)-(vii) of the Civil Services (C.C.A.) Rules.

4. *State of Orissa v. Govindadas*, (1959) S.C. [C.A. 412/58].

5. *Shyam Lal v. State of U. P.*, (1955) S.C.R. 26 (41); A. 1954 S.C. 369.

6. *Parshotam v. Union of India*, A. 1958 S.C. 36.

7. *Ramesh v. State of W. B.*, A. 1953 Cal. 181 (192); *Brojo v. Commr. of Police*, (1955) 59 C.W.N. 628 (623).

8. *Balkrishna v. State of M. B.*, A. 1957 M.B. 130; *Gafraj v. State of M. B.*, A. 1960 M.P. 299.

9. *Hirway v. State of M. B.*, A. 1958 M.P. 135 (139).

10. *Koshi v. State of T. C.*, A. 1952 T.C. 409.



on the ground of inefficiency; but if after the permission is granted and his service is terminated or after the leave preparatory to retirement is granted the officer applies for permission to resume his duties and that permission is refused, there cannot be any question of application of Art. 311 (2).<sup>11</sup>

Similarly, where a Government servant is given the option to voluntarily retire on a proportionate pension as an *alternative* to dismissal and he elects to retire, he cannot, after such order, turn round and challenge the validity of the order on the ground of non-compliance with Art. 311 (2).<sup>12,13</sup>

6. The following orders of termination of service have been held *not* to constitute 'dismissal' or 'removal':

(a) Termination in accordance with the terms of the contract of employment.<sup>14</sup>

(b) Termination in terms of the conditions of service as embodied in the relevant Departmental Rules applicable to the Government servant.<sup>15</sup>

(c) Option by a Government servant to retire<sup>16</sup> on proportionate pension, as an alternative to dismissal.<sup>17</sup>

(d) Compulsory retirement under Art. 465A of the Civil Service Regulations,<sup>17</sup> or similar rules (see *below*).

(e) Termination of services under the Railway Services (Safeguarding of National Security) Rules.<sup>18</sup>

#### Dismissal cannot be ordered with retrospective effect.

An order of dismissal or discharge can be given effect to only from the date of the order and not from any earlier date when the Government servant was actually in service.<sup>19</sup>

#### Compulsory retirement.

1. The Supreme Court has held that compulsory retirement of an officer who has completed 25 years of service (but before superannuation), under Note 1 to Art. 465A<sup>20</sup> of the Civil Service Regulations<sup>21</sup> would not attract Art. 311 (2) of the Constitution even though it is in fact ordered on the ground of misconduct, inefficiency or the like, because in compulsory retirement under such Rules, (which is a condition of service) the Government servant does not lose any of the benefits (e.g., salary, allowances or proportionate pension) which he has already earned by past services.<sup>21</sup> As it does not entail any penal consequences, it does not amount to a 'dismissal' or 'removal' so as to attract the operation of Art. 311.<sup>21</sup> Even where an inquiry is actually made into charges drawn up against the Government servant, that must be taken to be only for the satisfaction of the authority for ordering compulsory retirement.<sup>21</sup> Whether it is in the public interest or not to retain an

11. *Jai Ram v. Union of India*, (1954) S.C.A. 1251.

12. *State of Assam v. Harnath*, A. 1957 Assam 77.

13. Quære: What happens if the Government servant alleges that he was induced to elect under threat or duress?

14. *Salish Chandra v. Union of India*, A. 1953 S.C. 250.

15. *Hartwell v. Uttar Pradesh Govt.*, A. 1957 S.C. 886.

16. Cf. F. R. 56.

17. *Shyam Lal v. Govt. of U. P.*, (1955) 25 S.C.R. 26.

18. *Balakotiah v. Union of India*, A. 1958 S.C. 232 (238).

19. *Abdul Hamid v. Dt. Board*, (1957) 61 C.W.N. 880; *Amulya v. Bakshi*, A. 1958 Cal. 470.

20. Or. R. 165A of the Bombay Civil Service Rules.

21. *State of Bombay v. Doshi*, A. 1957 S.C. 892.

employee in service after he has completed 25 years of service is for the Government to decide and its opinion on the point cannot be challenged before a Court of law.<sup>22</sup>

II. (a) Where, however, there is no rule fixing the age of compulsory retirement, or, if there is one and the Government servant is retired before the age prescribed therein, that can be regarded only as a dismissal or removal within the meaning of Art. 311 (2).<sup>23</sup>

(b) It has, however, been held that retirement even before the age of superannuation, if it is ordered in pursuance of a policy of retrenchment or other administrative reasons and on payment of a proportionate pension, does not amount to 'removal' as there is no element of penalty involved,<sup>24,25</sup> except where he has a statutory right to continue upto a particular age.<sup>26</sup>

III. As regards ministerial officers, R. 56 (b) (i) of the Fundamental Rules provides—

"A ministerial servant who is not governed by sub-cl. (ii) may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient, up to the age of 60 years."<sup>27</sup>

Commenting upon this Rule, the Supreme Court has observed that this Rule implies that a ministerial officer has normally the right to continue in office till the age of 60, and could not be retired before that age except on the ground of inefficiency. So, if he was required to retire before the age of 60, he should be given an opportunity to show that he was still efficient and able to discharge his duties and consequently could not retire at that age.<sup>28</sup>

Of course, if the Rule gives a normal expectation to continue in service till the age of 60 years, it would seem, *prima facie* that Art. 311 (2) should be complied with if Government seek to retire him on the charge of inefficiency. The observations quoted above were, however, in the nature of obiter, and the Supreme Court did not, in *Jairam's case*,<sup>29</sup> consider the nature of 'compulsory retirement' which it did in the latter case of *Shyamlal*.<sup>30</sup> In the circumstances, it may be stated that the position relating to F.R. 56 (b) (i) has not yet been conclusively settled. It is clear, however, that the determination whether the officer is still efficient is a subjective determination by the competent authority and *mandamus* is not available to compel the Government to use its discretion in favour of the Petitioner.<sup>31,32</sup> Further, the suggestion made in *Jairam's case*<sup>33</sup> is considerably weakened by the decision in *State of Bombay v. Doshi*<sup>34</sup> which applied the test of loss of benefits already accrued, as the sole test for the applicability of Art. 311 (2).

The Andhra<sup>35</sup> and the Calcutta High Courts<sup>36</sup> have interpreted the rule to mean that though a ministerial officer may be required to retire at the age of 55, he is eligible for retention up to 60, if he continues to be efficient. The word 'ordinarily' implies that even though an

22. *Joshi v. State of Bombay*, A. 1958 Bom. 90.

23. *Dalip v. State of Punjab*, (1960) S.C. [C. A. 235/58].

24. *Chitloor v. State of T. C.*, A. 1953 T.C. 140; *Shrinath v. State*, A. 1956 M.B. 40 (43).

25. *Bhojanath v. State of Saurashtra*, A. 1954 S.C. 680.

1. The provision contained in r. 2046 (2) (a) of the Railway Establishment Code or r. 71 of the Orissa Service Code, Vol. I, is to the same effect.

2. *Jai Ram v. Union of India*, (1954) S.C.A. 1251.

3. *Shyamlal v. State of U. P.*, (1954) S.C.R. 26 (41).

4. *Hirendra v. State of W. B.*, (1955) 59 C.W.N. 450; *Raghu v. State of Orissa*, A. 1958 Orissa 202 (203).

5. *State of Bombay v. Doshi*, A. 1957 S.C. 802.

6. *Kesava v. Director of P. & T.*, A. 1958 A.P. 697.

7. *Basanta v. C. E. Engineer*, A. 1958 Cal. 657.



officer remains efficient, he has no right to be retained. Whether in a particular case a ministerial servant should be retained or not is a matter entirely for the authorities concerned and it is not for the court to inquire into the reasons for their decision.

The above interpretation would now find support from the Supreme Court decision in *Narasimhachar v. State of Mysore*,<sup>8</sup> where the Court interpreted somewhat similar rules against the Government servant:

Art. 294 (a) of the Mysore Service Regulations says—"A Government servant . . . who has attained the age of 55 years, may be required to retire, unless the Government considers him efficient and permits him to remain in service. . . ."

Art. 297 provides: "A Government servant in superior service who has attained the age of 55 years, may at his option retire from the service on a superannuation pension."

The Supreme Court held that the Rules, read together, fixed the age of retirement at 55 years and left it to the discretion of the Government to retain him in service beyond that age. Art. 297 did not leave it entirely at the option of the Government servant to continue after the age of 55 years; but where the Government decides to retain him after that age, the Government servant may still opt for retirement.<sup>9</sup>

In this case,<sup>8</sup> it is to be noted, the order of compulsory retirement was made during the pendency of an inquiry for misconduct and that the pension was reduced "to 2/3 the amount to which he would ordinarily be entitled in view of the irregularities committed by him". The order was obviously 'penal' within the meaning of the decision in *Shyamal*<sup>10</sup> and *Doshi*<sup>11</sup> cases. But those decisions, unfortunately, were not referred to in the decision at all, even though Note 1 to Art. 294, reproduced above, expressly stated that the exercise of the Government's power to retire the Government servant on the completion of the age of 55 years was 'untimely'.

IV. Where the Rule itself, says that compulsory retirement thereunder amounts to 'removal', i.e., Expt. II to Reg. 214 of the Police Regulations,<sup>12,13</sup> Art. 311 (2) would be attracted.

V. Compulsory retirement can, however, be ordered only in accordance with the Rules governing the service in question. If it is done in contravention of the Rules, the order becomes illegal.<sup>12,13</sup>

VI. Discretionary power of the Executive to select persons for compulsory retirement does not offend Art. 14.<sup>14</sup>

#### Discharge in terms of contract or conditions of service.

1. Government is free to enter into any contract for the employment of a person which is not in contravention of any constitutional provision and if the employee is discharged in terms of that contract, Art. 311 (2) is not attracted.<sup>15</sup> Hence, there is no question of application of the present Article where a person's services are sought to be terminated at the expiry of the term for which he was engaged or at the expiry of the period of notice by which, in accordance with the

8. *Narasimhachar v. State of Mysore*, A. 1960 S.C. 247.

9. *State of Bombay v. Doshi*, A. 1957 S.C. 892.

10. *Shankar v. State of M. P.*, A. 1955 Nag. 162 (164).

11. The Patna High Court has held in the negative, in *Ram Adhar v. State of Bihar*, A. 1954 Pat. 187. But, according to the Supreme Court decisions [see p. 564, ante], the sole test to be applied in such cases is whether the order entails penal consequences by way of loss of benefits accrued.

12. *State of Assam v. Harnath*, A. 1957 Assam 77.

13. *State of Andhra v. Kameshwara*, A. 1957 Andhra 794 (823).

14. *Raj Kishore v. State of U. P.*, A. 1954 All. 343.

conditions of his service, his services could be terminated,<sup>15,16</sup> or where the Rules provide that on the absence of a Government servant from duty without leave, in certain circumstances, he shall be deemed to have resigned.<sup>17</sup>

### *Illustrations.*

(i) In 1945, the Petitioner was employed by the Government of India on a five-year contract. But before the termination of the contract it was further agreed between the Petitioner and the Government that upon termination of the contract, he would be allowed to continue temporarily and would be governed by the Civil Services (Temporary Service) Rules, 1949. Those Rules provided that the service might be terminated by one month's notice. Subsequent to the expiry of the original 5-year term, the Petitioner was discharged with one month's notice. *Held*, that the discharge was in terms of contract and s. 240 (3) of the Government of India Act, 1935 was not attracted.<sup>18</sup>

(ii) Where a person was appointed on the term, that he would remain in service during the period of war and thereafter, 'if required', he has nothing to complain of if he is discharged at any time after the termination of the war.<sup>19</sup>

(iii) Where the order of appointment stated that the service was temporary and terminable without notice and without assigning any reason therefor, no question of application of Art. 311 (2) arises if the Government servant is discharged without any notice.<sup>20,21</sup>

(iv) Where the contract of employment specifically states that the appointment is "subject to your character and antecedents being satisfactorily verified by the civil authorities in accordance with the rules in force from time to time", and the petitioner is discharged on receipt of a police report that he was an active member of a subversive organisation, the Petitioner may be discharged on giving 14 days' notice in terms of the contract and Art. 311 (2) is not attracted.<sup>21</sup>

2. The above principle has been applied not only where there is a formal contract of employment or the conditions of termination of service are laid down in the order of appointment under which the Government servant entered into the service, but also where the conditions are embodied in the Departmental Rules relating to the service in question which must be taken to be a part of the contract of employment.<sup>22</sup> Some of the Rules, for instance, provide that the service can be terminated on serving a notice.<sup>23,24</sup> Art. 311 has no application to such a case because it is not a 'dismissal' or 'removal' but an ordinary case of a contract being terminated by notice under its terms.<sup>25</sup> In principle, there is no distinction between the termination of service of a person under the terms of a contract governing

15. *Salish Anand v. Union of India*, A. 1953 S.C. 250 : (1953) S.C.R. 655.

16. *M. R. Bakshi v. Saxena*, A. 1954 All. 5.

17. *Anil Nath v. Collector of Excise*, A. 1958 Cal. 407.

18. *Cf. Jamini v. Union of India*, A. 1955 Cal. 45 (51).

19. *Nand Kishore v. State of Bihar*, A. 1957 Pat. 541.

20. *Bhuneswar v. State of Bihar*, A. 1957 Pat. 326.

21. *Subrata v. Dy. Chief Accounts Officer*, A. 1958 Cal. 654.

22. *Parshotam v. Union of India*, A. 1958 S.C. 36 : (1958) S.C.R. 828.

23. *Cf. R. 5 of the Civil Services (Temporary Service) Rules, 1949; Rr. 1283 (d); 148 (3) of the Railway Establishment Code; s. 3 of the Ry. Services (Safeguarding of National Security) Rules.*

24. *Balakotalah v. Union of India*, A. 1958 S.C. 232.



him and the termination of his services in accordance with the terms of his conditions of service.

3. When a contract for a fixed term expires, it is open to Government to re-employ the officer on a fresh basis, and if the re-employment is made on different terms, the officer holds on the terms of such re-employment, even though the new terms were inferior.<sup>25</sup> If, however, after the expiry of the contractual period, no fresh engagement is made and the officer continues to hold on without any period being fixed, he holds on as a 'temporary' Government servant, and Art. 311 (2) would be applicable to the termination of such temporary employment<sup>26</sup>.

4. There has been a serious controversy as to whether Art. 311 (2) would be attracted where the contractual power to terminate service, say, after issuing a notice of discharge, is used by the Government for removing a Government servant for misconduct, inefficiency or the like, which would have otherwise attracted Art. 311 (2).<sup>27</sup>

The Supreme Court has solved this controversy in *Parshotam v. Union of India*<sup>28</sup> by laying down the following propositions—

(a) A termination of service brought about by the exercise of a contractual right is not *per se* a dismissal or removal within the meaning of Art. 311 (2), even though the *motive* operating in the mind of the Government, for applying the contractual power be the misconduct, negligence or inefficiency of the Government servant,<sup>29</sup> for, in such cases the termination of service does not carry with it the penal consequences of loss of pay, allowance or pension *already acquired* by past services, under P.R. 52. In such cases, it is immaterial whether there has actually been an allegation of misconduct or a proceeding, before the contractual power is used;<sup>30</sup> or the order of discharge itself cites the allegation.<sup>31</sup>

(b) In other words, the test for applicability of Art. 311 (2) is not the motive of the authority but the *consequences* of the order of termination of the service.<sup>32</sup> It follows, therefore, that where the Government, instead of simply terminating the service in terms of the contract of employment, wants to impose penal consequences upon the Government servant, by way of forfeiture of the pay, allowances or pension which he has acquired by his past services, Government cannot do so by simply issuing a notice under the contract; it can be done only by a proceeding in conformity with Art. 311 (2), on the ground of misconduct, inefficiency or similar charge against the Government servant.<sup>33</sup>

#### Illustration.

The plaintiff, a permanent Railway employee, was charge-sheeted on the allegation of some misconduct and directed to show cause why

25. *Satish Chandra v. Union of India*, (1952-4) 2 C.C. 587 : (1953) S.C.R. 655 : A. 1953 S.C. 250.

1. *Hartwell v. Govt. of U. P.*, A. 1957 S.C. 886.

2. *Ishar Das v. State of Pepsu*, A. 1952 Pepsu 148. [The weight of the view has been shaken by the Supreme Court decision in *Parshotam v. Union of India* (see p. 564, *ante*), inasmuch as it can be hardly said that by merely holding on on the expiry of a contract for a fixed term, the employee acquires a right to hold the post].

3. *Vide C 3*, Vol. II, p. 486.

4. *Srinivas v. Union of India*, I.L.R. 58 Bom. 673.

5. *Probodh v. D. P. I.*, A. 1960 Cal. 306 (309).

6. *Parshotam v. Union of India*, A. 1958 S.C. 36 : (1958) S.C.R.

he should not be dismissed from service under r. 1702, Ry. Establishment Code. The plaintiff submitted his explanation on 28-2-49 and on 16-3-49 an order was passed against him that he was 'removed' from the service with effect from 18-3-49 and that he would be given one month's pay in lieu of notice of removal. The order further stated that for the period from 8-2-49 to 18-3-49 during which he remained under suspension, he would get half of his pay as subsistence allowance.

*Held*, the order was penal inasmuch as apart from removal, he was being deprived of half of his pay and allowances for a period, which could not have been ordered if it was a case of removal according to the conditions of service in r. 148 (3)-(4). Though the word 'removal' was used in the order, it was a case of 'dismissal' under r. 1702 of the Code and the order was void for non-compliance with Art. 311 (2).<sup>7</sup>

5. But if the order does not entail penal consequences, it does not constitute 'dismissal' merely because the contractual power was used by the authority, with a motive to punish the Government servant.\*

It follows that there is nothing to debar the Government from discharging a Government servant in terms of the conditions of service after a prior order of dismissal has been set aside and the Government servant re-instated.<sup>8</sup>

#### **Whether it is permissible to contract out of Art. 311 (2).**

It is, however, not permissible to contract out of the provisions of the Constitution, including the provisions of Art. 311 (2).<sup>9</sup> This has been distinctly acknowledged in the following observation of the Supreme Court—

"The State can enter into contracts of temporary employment and impose special terms in each case, *provided they are not inconsistent with the Constitution.*"<sup>10</sup>

Hence, any provision in a service contract with the Government to the effect that Government would be entitled to terminate the service of the employee for mental or physical incapacity or misconduct without any notice or without giving any opportunity to the employee to show cause would be void.<sup>11</sup> It is quite lawful in a contract to provide that the service would be liable to be terminated with or without notice, but if it provides that the service can be terminated on the ground of misconduct or inefficiency, without giving him an opportunity to show cause, it militates against Art. 311 (2) and is to that extent void.<sup>11,12</sup>

#### **Discharge of a temporary officer, holding otherwise than for a fixed term or on 'quasi-permanent service'.**

1. R. 5 of the Central Services (Temporary Service) Rules, 1949 says—

"(a) The service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant.

7. *Union of India v. Jeewan Ram*, A. 1958 S.C. 905.

8. *Waman v. Collector of Central Excise*, (1958) 60 Bom. L.R. 55.

9. *Fakir v. Chakravarti*, (1954) 58 C.W.N. 336 (340).

10. *Satis Chandra v. Union of India*, (1953) S.C.R. 655.

11. *Ishar Das v. State of Pepsu*, A. 1952 Pepsu 148.

12. *Subhagchand v. State of Saurashtra*, A. 1954 Sau. 146.



(b) The period of such notice shall be one month, unless otherwise agreed to by the Government and by the Government servant.<sup>13</sup>

2. It follows from the decision in *Parshotam v. Union of India*<sup>14</sup> that when a person holds a temporary post, or is appointed temporarily to a permanent post, without specifying a fixed term and such temporary officer has not attained a quasi-permanent status, his discharge would not constitute a 'dismissal' or 'removal' so as to attract Art. 311 (2), except where Government intends to inflict penal consequences upon him by way of loss of the benefits acquired by him by his past services.

3. Thus, no penal action is involved where a temporary officer is simply 'discharged' on the abolition of the temporary post,<sup>15</sup> even if the abolition of the post takes place on the failure of departmental or criminal proceedings against the officer on the charge of some misconduct.<sup>16</sup>

On the same principle, when a person is appointed to *officiate* during a particular contingency, such as leave vacancy, Art. 311 (2) is not attracted when that particular contingency terminates.

#### Illustration.

Petitioner was appointed 'to officiate' as Mouzadar during the period of leave granted to the permanent incumbent. The latter got an extension of leave and thereafter resigned. On both occasions, the Petitioner was asked 'to continue'. Thereafter, applications were invited to fill up the permanent vacancy caused by the resignation of the permanent incumbent; the Petitioner also applied amongst others, but failed to be selected. The best candidate was appointed and the service of the Petitioner was terminated. *Held*, the Petitioner's appointment was not for an indefinite period, but an appointment till the happening of a specified contingency, *viz.*, the period of leave, and, thereafter, till the appointment of a permanent incumbent. The termination of his service was accordingly not against the conditions of service, and Art. 211 (2) was not attracted.<sup>16</sup>

4. But Art. 311 (2) would be attracted if the temporary or officiating appointment is terminated by an order which imposes other penal consequences, *e.g.*, forfeiture of salary,<sup>17a</sup> or withholding of increment,<sup>17</sup> already earned.

#### Probationer, who is.

1. What is an appointment on probation has been already explained (p. 561, *ante*).

2. Where the Rules provide that all appointments in a service are to be on probation and Government has no discretion in the matter, an officer appointed to such service becomes a probationer according to the Rules even though the order of appointment does not expressly mention the words 'on probation'.<sup>18</sup>

3. It is also absolutely within the province of the Government to extend the probationary period of a Government servant from time to time according to circumstances.<sup>19</sup>

Even when there is no such specific order of extension of the

13. *Parshotam v. Union of India*, A. 1958 S.C. 36.

14. *Cf. Satis Chandra v. Union of India*, A. 1953 S.C. 250.

15. *Braju Nandan v. State of Bihar*, A. 1955 Pat. 353 (356).

16. *Bijoy v. State of Assam*, 1954 Assam 12 (14).

16a. *Babulal v. Principal*, A. 1960 M.P. 294.

17. *Gurdip v. State of Punjab*, A. 1960 Punj. 126.

18. *State of Punjab v. Sukhbans*, A. 1957 Puri. 191 (193).

19. *State Govt. of M. P. v. Amrillal*, A. 1953 Nag. 138.

period of probation<sup>20</sup> or the extended period has also expired,<sup>21</sup> the Government servant continues to be on probation until the competent authority issues an affirmative order of confirmation on being satisfied that the Probationer has duly complied with the terms of his probation.<sup>22, 22.23</sup> Nor is there anything to debar the competent authority to take into consideration the conduct of the Probationer subsequent to the expiry of the normal period of probation, in determining whether the Probationer should be confirmed or not.<sup>24</sup>

4. Where, however, the Rule expressly provides that the period of probation can be extended "up to one year" [e.g., r. 20 of the U. P. Public Health Services Rules], it can be contended that even after the maximum period allowed by the Rules, the person still remains on probation.<sup>25</sup>

#### Discharge of Probationer: Art. 311 (2), if attracted.

I. Some of the Departmental Rules<sup>1</sup> provide that if a Probationer is discharged on account of some specific *fault* or *misconduct*, it amounts to 'removal' or 'dismissal'. Hence, where these Rules are applicable, a reasonable opportunity must be given under Art. 311 (2), before discharging a Probationer on some specific charge.<sup>2,3</sup>

II. Where there is no such specific Rule, the principles formulated by the Supreme Court<sup>4</sup> (p. 563, *ante*) will apply—

(a) Discharge of a probationer at any time before he is confirmed, without any imputation and without any penal consequences other than termination of service would not attract Art. 311 (2).<sup>5,6</sup>

Appointed to a post on probation gives to the person so appointed no right to the post; hence the termination of that employment without any inquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment<sup>7</sup>

(b) But if the discharge is ordered on the ground of misconduct or the like and is attended with penal consequences, Art. 311 (2) must be complied with.<sup>8</sup> Hence,

If, instead of terminating the services of a Probationer without inquiry, the employer chooses to hold an inquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career.<sup>9</sup> Hence, if a Probationer is discharged as a result of an inquiry on any such ground, the order of termination of service will be struck down if the requirements of Art. 311 (2) are not duly complied with.<sup>8</sup>

20. *Naresh v. Director*, (1956) 60 C.W.N. 767 : A. 1959 Cal. 100.

21. *Venkatapathy v. D. I. G., Police*, A. 1958 Mad. 216 (217).

22. *State of Punjab v. Sukhbans*, A. 1957 Punj. 191 (193).

23. The Mysore High Court [*Ramachandra v. State of Mysore*, A. 1960 Mys. 65] holds, to the contrary, that where a person is appointed on probation for a specified period, to a permanent post, he gets substantively appointed to the permanent post on the expiry of the specified period, even though no order of confirmation is passed.

24. *Venkatapathy v. D. I. G., Police*, A. 1958 Mad. 216 (217).

25. *Kanshi Ram v. State of U. P.*, A. 1957 All. 330.

1. E.g., R. 55B of the C.S. (C.C.A.) Rules; Expl. to r. 49 of the Bihar S.C. (C.C.A.) Rules.

2. *State of Bihar v. Gopikishore*, A. 1960 S.C. 689 (691).

3. *Naresh v. Director*, (1956) 60 C.W.N. 767 (775).

4. *Parshottam v. Union of India*, A. 1958 S.C. 36.

5. *State of Bihar v. Gopikishore*, A. 1960 S. C. 689 (691).



In an Allahabad<sup>6</sup> case, where a person who was a stammerer from birth was appointed to a permanent post on probation and his probationary period was extended from time to time for 5 years during which he was medically examined twice and found fit, and was subsequently discharged on the ground of stammering, it was held that the discharge was invalid owing to non-compliance with Art. 311 (2).

### 'Reduction in rank'.

1. Reduction in rank means the degradation in rank or status of the officer,<sup>7</sup> directed by way of penalty.<sup>8</sup> It thus involves two elements<sup>9</sup>—(a) a reduction in the physical sense; (b) such degradation or demotion must be by way of penalty.

(a) Reduction in rank in the *physical sense* takes place where the Government servant is reduced to a lower post<sup>10</sup> or to a lower pay-scale.<sup>11,12</sup> Even reduction to a lower stage in the same pay scale (ordered by way of penalty) would involve a reduction in rank,<sup>13</sup> for the officer loses his rank or seniority<sup>14</sup> in the gradation list of his substantive rank.<sup>15</sup> Even the stoppage of future chances of promotion may constitute reduction in rank.<sup>16</sup> But withholding of increments of pay does not constitute reduction in rank inasmuch as it is a separate category of punishment under r. 49 of the Civil Services (Classification, Control and Appeal) Rules (see p. 565, *ante*).

(b) As regards the *penal nature* of the reduction the Supreme Court<sup>17</sup> has applied the test of 'right to the rank' in question, in the same manner as the 'right to the post' test has been applied in the case of dismissal or removal. Reduction in rank takes place only when a person is reduced from his substantive rank.<sup>18</sup> Thus,

(f) Where a Government servant has a *right* to a particular rank, the very reduction from that rank will be deemed to be by way of penalty<sup>19</sup> and Art. 311 (2) will be attracted, without more. Thus,

An officer who holds a permanent post in a substantive capacity, cannot be transferred to a lower post, without complying with Art. 311 (2).<sup>12,14</sup>

(ii) On the other hand, where a Government servant has no title to a particular rank, under the contract of his employment or conditions of service,—there will ordinarily be no reduction in rank within the meaning of Art. 311 (2).<sup>19</sup>

But Art. 311 (2) will be attracted even in such cases if the reduction visits the Government servant with *penal* consequences, such as loss of seniority in his *substantive* rank; stoppage or postponement of his future chances of promotion.<sup>11</sup> Where a case of this class comes before the Court, the Court has to see from the order passed whether it affects the seniority of the Government servant in his substantive rank or the chances of his future promotion.<sup>14</sup>

6. *State of U. P. v. Kanshi Ram*, A. 1958 All. 844.

7. *Pulin v. Divisional Supdt.*, (1952) 89 C.L.J. 241; *Kali Prasanna v. State of W. B.*, (1952) 56 C.W.N. 492.

8. *Vicharay v. State of M. P.*, A. 1952 Nag. 288; *Jatindra v. R. Gupta*, (1953) 58 C.W.N. 128 (132).

9. *Rabindra v. Manager, E. Ry.*, (1955) 59 C.W.N. 859 (865).

10. *Union of India v. Parshotam*, A. 1956 Punj. 207, affirmed by *Parshotam v. Union of India*, A. 1958 S.C. 36.

11. *Akhil v. State of U. P.*, A. 1960 All. 193 (198).

12. *Cf. Dandapani v. State of Orissa*, A. 1959 Orissa 329.

13. *Aya Ram v. Government of Punjab*, A. 1955 N.U.C. 4699.

14. *Hartwell v. Uttar Pradesh Govt.*, A. 1957 S.C. 250.

15. *P. R. 15*.

16. *State of Punjab v. Sukhbans*, A. 1957 Punj. 191.

17. *Dhadjadhari v. Union of India*, A. 1958 Cal. 546 (550).

2. In some earlier cases, it was held that it was the intention of the authority or the conduct of the Government servant concerned which attracted the operation of Art. 311 (2). But the Supreme Court decisions referred to above established that it is the *penal consequences* of the order which is material and that this question arises only where the Government servant had no substantive right to the rank or post from which he has been reduced.

It would follow, therefore, that there is *no* reduction in rank in the following cases :

(i) Where certain posts were allotted to the Petitioners under a misapprehension and the Petitioners had no right to remain in those posts, *e.g.*, for want of the requisite qualifications, and so they were reverted to their original lower posts.<sup>18</sup>

(ii) When an officer loses his seniority owing to the revision of the seniority rules;<sup>19</sup> or because a more senior officer is transferred to the cadre from elsewhere, in the usual course;<sup>20</sup> or owing to intergradation or reorganisation of States.<sup>21</sup>

A person who had attained a benefit in the way of seniority by relaxation or contravention of rules and who has been deprived of that benefit by a subsequent cancellation of such relaxation cannot claim as of right any particular rank in his substantive cadre or seek to enforce such right.<sup>18</sup>

(iii) Where the vacancy does not arise, *e.g.*, where the Petitioner had been promoted to a selection post, superseding a senior officer whose case is subsequently reviewed and the Petitioner has to revert to his original post because the senior is found fit for promotion, upon reconsideration.<sup>22</sup>

(iv) When the services of an officer are lent by one Department to another, on a temporary basis or to a temporary post and the borrowing authority considers that the officer concerned is guilty of misconduct which calls for the penalty of dismissal or removal, the borrowing authority may revert the officer to the lending authority under whom he held his permanent substantive post, without complying with Art 311 (2) for the purposes of such revision.<sup>23</sup>

(v) Where the Petitioner was allowed to cross the efficiency bar and to draw the next increment by the order of a superior officer who had no authority, under the Rules, to make such order, a proper order by the competent authority, withholding the increment until the Petitioner qualifies at the prescribed test, does not attract Art. 311 (2).<sup>24</sup>

(vi) Where an adverse entry is made in his character roll according to the Rules governing his conditions of service.<sup>25</sup>

(vii) Where upon the integration of an Indian State, *transitional* appointments were made, pending a reorganisation of the services, and, thereafter, the employees are appointed to new posts under the

18. *Amalendu v. Kailash*, (1952) 56 C.W.N. 846; *Chauhan v. Collector*, A. 1955 All. 528.

19. *Devasahayam v. State of Madras*, A. 959 Mad. 1; *Kamatamma v. State of Mysore*, A. 1960 Mys. 255.

20. *Jalindra v. R. Gupta*, (1953) 58 C.W.N. 128 (132).

21. *Samuel v. State of Kerala*, A. 1960 Ker. 231.

22. *Chauhan v. Collector of Central Excise*, A. 1955 All. 528.

23. *Jalindra v. Union of India*, (1957) 61 C.W.N. 815 (823, 825).

24. *Mathur v. Chatterjee*, (1955) 59 C.W.N. 812.

25. *Tandon v. Judl. Commr.*, A. 1957 Raj. 230.



scheme of reorganisation, with conditions of service not inferior to those of the posts held by them in the Indian State.<sup>1</sup>

3. 'Reduction in rank' applies to the case of a Government servant who is expected to remain in service after the reduction. It cannot apply in the case of reduction of *pension*.<sup>2</sup>

### Reversion from officiating appointment.

1. Where a person is appointed to a higher post in an *officiating* capacity, he does not acquire any legal right to hold that post for any period whatsoever and, accordingly, there is no 'reduction in rank' within the meaning of Art. 311 (2), if he is merely reverted to his substantive post,<sup>3</sup> even though the *motive* for such reversion be misconduct, inefficiency or the like.<sup>4</sup>

### Illustration.

The Petitioner, who was officiating in a Class II post, was reverted to his substantive post in Class III on the ground of certain shortcomings but with remark that the reversion would not be a bar to his being considered again for promotion. *Held*, it did constitute a 'reduction in rank' so as to attract Art. 311 (2).<sup>5</sup>

2. The above decision of the Supreme Court<sup>6</sup> *supersedes*<sup>7a</sup> the view taken by some High Courts<sup>8</sup> that even in the case of an officiating appointment to a higher post, if the reversion to the lower substantive post is ordered as a penalty for some misconduct,<sup>9</sup> it amounts to a reduction in rank since it would stand in the way of the Government servant in securing his promotion in the normal course.<sup>10</sup>

"The real test for determining whether the reduction in such cases is or is not by way of punishment is to find only if the order for the reduction also visits the servant with any penal consequences."<sup>11</sup> (See p. 573, *ante*).

3. An order of reversion from an officiating post may attract art. 311 (2) only if the order "visits the servant with any *penal consequences*"<sup>12</sup> other than the reversion, *e.g.*—

- (a) stopping<sup>13</sup> or postponing his future chances of promotion;<sup>14</sup>
- (b) affecting his seniority in the substantive rank;<sup>15</sup>
- (c) forfeiting his pay or allowances<sup>16</sup> or increment<sup>17</sup> already earned.<sup>18</sup>

1. *Amar Singh v. State of Rajasthan*, A. 1958 S.C. 228 (232).

2. *Narasimhaiah v. State of Mysore*, A. 1960 S.C. 247 (251).

3. *Parshotam Dhingra v. Union of India*, A. 1958 S.C. 36 : (1958) S.C.R. 36.

4. *Devashyam v. State of Madras*, A. 1959 Mad. 33.

4a. *Jai Shankar v. State of U. P.*, A. 1958 All. 741.

5. *Baldev v. Govt. of Pepsu*, A. 1954 Pepsu 98.

6. *Rabindra v. General Manager*, (1955) 59 C.W.N. 859 (869); *Jatindra v. Union of India*, (1957) 61 C.W.N. 815 (825).

7. This view found favour with Bose J. (in the minority) in *Parshotam v. Union of India*, A. 1958 S.C. 36, but he was overruled by the majority [*Probodh v. D. P. I.*, A. 1960 Cal. 306 (309)].

8. *Dineshwar v. C. C. Supdt.*, A. 1960 Cal. 209.

9. *Union of India v. Jeevan Ram*, A. 1958 S.C. 905.

10. *Gurdip v. State of Punjab*, A. 1960 Punj. 126.

### Reversion from temporary appointment to substantive post.

1. It is now settled by the Supreme Court decision in *Parshotam v. Union of India*<sup>11</sup> that when a person is appointed to a *temporary post*, without fixed term, he acquires no right to hold that post, unless and until his service in the temporary post ripens into a quasi-permanent service. In such a case, the Supreme Court holds, it is an implied term of his employment in the temporary post (even though the appointment may have been on a substantive and not officiating basis) that it is terminable by the Government at any time, on reasonable notice. Reversion from such temporary post to the Government servant's substantive post does not, accordingly, *prima facie* constitute reduction of rank. Hence, there is no question of application of Art. 311 (2) when such reversion takes place, e.g.,

(a) On account of the abolition of the temporary post;<sup>12</sup>

(b) Where promotion to the higher post had been done under a wrong application of the Rules and a fresh selection on a regular basis was ordered by the Government;<sup>13</sup>

(c) Where the officer is simply reverted to his substantive post without imposing any additional penalty, even though such reversion is ordered on the ground of unsatisfactory work or misconduct.<sup>14</sup>

The view of the Orissa High Court<sup>15</sup> that where a Government servant is appointed to a temporary post in *substantive capacity*, the Government servant has a right to hold that post so long as that post continues, so that he may be reverted before that to his original post only in compliance with Art. 311 (2), is not supported by the Supreme Court decision.<sup>16</sup>

2. On the other hand, it is not correct to say (as the Punjab<sup>17</sup> High Court had held) that there cannot be a scope for application of Art. 311 (2) (or 'reduction in rank') in any case of reversion from a *temporary post* in terms of the contract of employment. According to the Supreme Court, even in the case of appointment to a temporary post, the test of *penal consequences* is the determining factor.

If, instead of simply reverting the Government servant from his temporary post to his substantive post, Government intends to penalise the Government servant for some misconduct or the like by way of forfeiture of the benefits earned by him by service in that post, or to affect him in his future chances in his substantive post it will constitute 'reduction in rank' and Art. 311 (2) will be attracted.<sup>18</sup>

It would be similarly penal if the officer is reverted not to his substantive post but to a post in a rank lower than the substantive post or the order entails penal consequences other than those flowing out of the reversion,<sup>19</sup> e.g., exclusion from the 'fit list' for promotion,<sup>20</sup> a remark of censure in the Confidential Roll for misconduct.<sup>21</sup>

It will be, however, for the Government servant to establish that the reversion has been attended with penal consequences, and if he fails to establish that, the reversion will not be invalid for non-compliance with Art. 311. (2).<sup>22</sup>

11. *Parshotam v. Union of India*, A. 1958 S.C. 905.

12. *Brajanandan v. State of Bihar*, A. 1955 Pat. 353 (355).

13. *G. K. Sinha v. Collector*, A. 1957 All. 152.

14. *Jai Shanker v. State of U. P.*, A. 1958 All. 741 (F.R.).

15. *Kashinath v. Kapila*, A. 1952 Orissa 492.

16. *Rattan Lal v. Union of India*, A. 1955 Panj. 229.

17. *Jai Shankar v. State of U. P.*, A. 1958 All. 741 (746) F.R.

18. *Dhadjadhari v. Union of India*, A. 1958 Cal. 546 (550).

19. *Bharabendra v. J. T. Commr.*, A. 1958 Cal. 559.

20. *Hartwell v. Uttar Pradesh Govt.*, (1958) S.C.A. 1.



# Suspension.

## (A) Pending Departmental Inquiry.

1. Suspension pending departmental inquiry<sup>21</sup> is something temporary and does not involve punishment.<sup>22</sup> It means a temporary deprivation of the officer's functions or the right to discharge his duties but does not amount to any lowering down or reduction of his rank or status.<sup>23</sup> Hence, no opportunity to show cause under Art. 311 (2) is necessary before making an order of suspension of this nature.<sup>24</sup>

2. It has been held<sup>25, 26</sup> that a power to suspend pending inquiry is an implied term in every contract of service.

3. A person who has been suspended pending inquiry does not cease to be a Government servant.<sup>27</sup> He is only prevented from discharging the duties of his office for the time being.<sup>28</sup>

## (B) Pending arrest or criminal proceeding.

1. The Rules of some Departments also authorise suspension pending criminal proceedings against a Government servant, as soon as an accusation or investigation connected with his position as Government servant is made or he is arrested.<sup>29</sup> No opportunity to show cause is necessary for such suspension.<sup>30</sup>

2. The appropriate authority may or may not initiate departmental proceedings after the termination of the criminal proceeding ceases to be operative as soon as the criminal proceeding terminates one way or the other.<sup>31</sup> If departmental proceedings are started, a fresh order of suspension, pending that enquiry, is to be made.<sup>32</sup>

3. Where, however, the Appellate Court sets aside the conviction on the ground of proper sanction and a fresh sanction was obtained and the trial continued, it was held that the criminal proceeding had not terminated and the initial order continued till the disposal of the fresh proceeding.<sup>33</sup> Again, if departmental proceedings are started pending the criminal proceeding, the order of suspension does not terminate automatically on acquittal in the criminal case,<sup>34</sup> but continues till the departmental proceedings are completed.

21. Cf. *Om Prakash v. State of U. P.*, (1955) 2 S.C.R. 391 (401).

22. *Badri Prasad v. Dt. Board*, A. 1952 All. 681 (683).

23. *Dandapani v. State of Orissa*, A. 1953 Orissa 329.

24. *Prem Biharilal v. State of M. B.*, A. 1954 M.B. 49.

25. *Thimma v. State of A. P.*, A. 1958 A.P. 35.

26. *Venkateswarlu v. State of Madras*, A. 1954 Mad. 587; *Gurudeva v. State of Bihar*, A. 1955 Pat. 131.

27. *Ghouse v. State of Andhra*, A. 1957 S.C. 246 (249).

28. Where, however, a Government servant's conditions of service are embodied in an express contract or the Rules relating to such service, it is debatable if anything outside such contract or Rules can be imported into his conditions of service.

29. *Surendra v. Ajiwani*, A. 1956 Mad. 95.

30. *Dandapani v. State of Orissa*, A. 1953 Orissa 329.

31. E.g., under Reg. 17 of the Posts and Telegraphs Manual, Vol. II [cf. *Hemanta v. Sen Gupta*, (1952) 36 C.W.N. 676]; r. 11 (a) of the C.C.R. and State Ry. Establishment Code [cf. *Pulin v. Divisional Supdt.*, A. 1953 Cal. 45]; r. 93A, Orissa Service Code, Vol. I [cf. *Narayan v. State of Orissa*, A. 1957 Orissa 51 (54)].

32. *Gopalkrishna v. State of M. P.*, A. 1952 Nag. 170; *Kali Prasonna v. State of W. B.*, (1952) 56 C.W.N. 402.

33. *Narayan v. State of Orissa*, A. 1957 Orissa 51 (55).

34. *Gopalkrishna v. State of M. P.*, A. 1952 Nag. 170.

35. *Jagdish v. State of U. P.*, A. 1957 All. 436 (438).

(C) *As a substantive penalty.*

Suspension may also be awarded as a substantive punishment under the Civil Service Regulations.<sup>11</sup> Government is not entitled to inflict suspension as such substantive punishment without affording the officer a reasonable opportunity of showing cause.<sup>12</sup>

**Position of a Government servant under suspension pending inquiry.**

1. A Government servant who has been suspended pending departmental enquiry or judicial proceeding does not cease to hold his office; he only ceases to exercise the powers and discharge the duties of his office for the time being. His powers, functions, salaries and other privileges remain in abeyance but he does not cease to be bound by his obligations as a Government servant. He continues to be subject to the same discipline and subject to the same authorities. It is something less than termination of service. Hence, during the period of suspension, the Government servant cannot seek improvements elsewhere nor can the Government employ another person in his place.<sup>13</sup>

2. On the other hand, since the performance of the contract remains in abeyance, the employee cannot enforce the terms of the original contract and claim his salary or contractual wages, as of right. He is only entitled to 'subsistence allowance' as provided by the Rules or conditions of service.<sup>14</sup>

3. Even where the Payment of Wages Act, 1936 applies to any class of Government servants, an employee belonging to that class cannot, during suspension, claim full wages, or complain to the Authority under that Act that his wages have been 'deducted', since there has been no *deduction* of his wages. He is not entitled to wages during the period of suspension, according to the conditions of service, but is entitled only to get subsistence allowance.<sup>15,16</sup>

**An order of suspension cannot be made with retrospective effect.**

1. The basic idea underlying the word 'suspend' is that a person while holding an office and performing its functions or holding a position or privilege, should be interrupted in doing so and debarred for the time being from further function in the office or holding the position or privilege. There can be no meaning in suspending a man from working during a period when the period is past and he has already worked or suspending a man from occupying a position or holding a privilege in the past when he has already occupied or held it. An order of suspension can be made to operate only as respects the period which commences from the date of the order and lies after it.<sup>17,18</sup>

*Illustration.*

R. 2 in Sec. IV of App. 3 to the Fundamental Rules, Vol. II and r. 17 of the P. & T. Manual provide—"A servant of Government against whom a criminal charge . . . is pending should also be placed under suspension by the issue of specific orders to this effect during periods when he is not actually detained in custody or imprisoned. . . . H

11. Also under r. 49 (v) of the Civil Services (Classification, Control and Appeal) Rules.

12. *Gopalkrishna v. State of M. P.*, A. 1952 Nag. 170; *Kali Prasanna v. State of W. B.*, (1952) 56 C.W.N. 492.

13. *Divisional Supdt. v. Mukund*, A. 1957 Pat. 130 (132) F.B.

14. *Thillai Natarajan v. Fernandes*, (1956) 58 Bom. L.R. 821.

15. *Hemanta v. S. N. Mukherjee*, (1953) 58 C.W.N. 1 (7).

16. *Narayan v. State of Orissa*, A. 1957 Orissa 51.

17. *Abid Md. v. The State*, A. 1958 M.P. 44.



was arrested on certain criminal charges and placed under suspension. He was ultimately discharged on 13-10-50, but his suspension order was not revoked. On 16-1-51, he was re-summoned by the Presidency Magistrate on the same charges and the case was transferred to a Special Judge. In April 1952, the High Court quashed the proceedings before the Special Judge but directed a retrial according to law. Thereafter, on 29-4-52, two orders were issued: by the first order H was re-instated to office with effect from 13-10-50 and by the second order he was placed under suspension with effect from 16-1-51, pending investigation into his conduct. On application under Art. 226 of the Constitution, the Court issued a Mandamus directing cancellation of the order of suspension in so far as it related to the period between 16-1-51 and 28-4-52 (both inclusive).<sup>18</sup>

2. While setting aside an order of dismissal, an authority *cannot* make an order of suspension with retrospective effect.<sup>19</sup>

3. It would follow, accordingly, that when an order of suspension is subsequently found to be invalid (*e.g.*, because it was made by a person having no authority to make it) and a valid order is made, the Petitioner must be held to have been in service between the date of the previous invalid order and the subsequent valid order and is entitled to his salary during this intervening period.<sup>20</sup>

#### Effect of termination of the proceedings upon the order of suspension made pending enquiry.

1. It is evident that an order of suspension pending an enquiry against the civil servant, is not a substantive penalty<sup>21</sup> but is in the nature of an interlocutory order which ceases to exist after the proceedings terminate by an order of acquittal, dismissal or removal.<sup>22</sup> "The order of dismissal replaced the order of suspension which then ceased to exist."<sup>23</sup> The result is the same whether the termination of service is ordered as a result of the departmental proceedings or otherwise,<sup>24</sup> for, in either case, the relationship of master and servant ceases.<sup>25</sup>

2. It follows, therefore, that if the order of dismissal is subsequently set aside or declared illegal, that would not revive the order of suspension which had ceased to exist as soon as the proceedings had terminated by the making of the order of dismissal.<sup>26</sup> Consequently, the civil servant is entitled to recover arrears of full salary since the date of the wrongful dismissal *as if he were on duty*.<sup>20, 22</sup>

3. As to the effect of termination of criminal proceedings where a Government servant had been suspended because of the criminal proceeding against him, see p. 577, *ante*.

#### Deduction of wages during suspension and Payment of Wages Act.

The conditions of service of an employee of a railway authority with regard to his suspension and with regard to the wages to which he is entitled during the period of suspension are regulated by the rules framed under sec. 241 of the Government of India Act, 1935 (or Art. 309 of the Constitution). The Payment of Wages Act has no application with regard to those conditions, and it is not open to

18. *Hemanta v. S. N. Mukherjee*, (1953) 58 C.W.N. 1 (7).

19. *U. P. Government v. Tabarakh*, A. 1956 All. 151.

20. *Baldev v. Govt. of Pepsu*, A. 1954 Pepsu 98 (109); *Om Prakash v. State of U. P.*, (1955) 2 S.C.R. 391; A. 1955 S.C. 600.

21. *Lakman v. State of M. P.*, A. 1950 M.P. 294 (295).

22. *U. P. Govt. v. Tabarakh*, A. 1956 All. 151 (152); *Prafulla v. I. G. Police*, A. 1959 Cal. 1 (5).

an employee to claim an amount as being illegally deducted by the railway authority when that deduction is legal and permissible under such rules.<sup>23</sup>

**'Reasonable opportunity to show cause'.**

1. It is now settled<sup>24,25</sup> that the person charged has ordinarily the right to reasonable opportunity of showing cause *twice*,<sup>26,1</sup> before the order of dismissal, etc., is passed. There are two stages in a proceeding under the present Article: the first being when the charges are enquired into and at this stage, the person required to meet the charges should be given a reasonable opportunity to enter into his defence; and the second stage is when after the enquiring authority has come to its conclusion on the charges and there arises the question of the proper punishment to be awarded. A notice has then again to be given to show cause against the punishment proposed.<sup>26,1</sup>

2. As observed by the Supreme Court in *Khem Chand's case*,<sup>1</sup> 'reasonable opportunity' in Art. 311 (2) implies opportunity in three respects—

(i) To deny the guilt alleged and to establish innocence.

(ii) To defend, by examining the Government servant himself and his witnesses and cross-examining the witnesses produced against him.

(iii) To make representation as to why the punishment proposed, after the inquiry is over, should not be inflicted.

In short, this clause requires that the civil servant in question is entitled to have an opportunity to show cause at *two stages*,<sup>1,2</sup> (a) once at the enquiry stage, against the charges levelled against him; (b) again, after he is found guilty and punishment is provisionally proposed,—against the punishment so proposed upon the finding.<sup>26</sup>

3. This does not mean that when the opportunity to show cause against the proposed punishment is offered to the delinquent officer, after a proper inquiry made into the charges, the delinquent officer can ask for a repetition of the inquiry stage<sup>24</sup> or a second opportunity to meet the charges.<sup>2</sup> Assuming that a proper inquiry has been made before the notice to show cause against the punishment proposed is served, the only right of the delinquent officer at this subsequent stage is to represent against the punishment proposed as the result of the findings of the inquiry, and the grounds upon which the punishment is proposed.<sup>24</sup> He is therefore, entitled to show not only that the punishment proposed is not warranted by the findings but also that the decision is not warranted by the facts on the record,<sup>1</sup> or, in other words, at the second stage, he is entitled to contend—(a) that he has not been guilty of any misconduct to merit any punishment at all; (b) that the particular punishment proposed is much more drastic and severe than he deserves.<sup>1</sup>

4. In some cases, the view had been taken that in exceptional circumstances, it would not be necessary to give notices at two stages.

23. *Natarajan v. Fernandez*, (1956) 58 Bom. L.R. 821.

24. *High Commissioners v. Lall*, A. 1948 P.C. 121, affirming, A. 1945 F.C. 47.

25. Cf. *John v. State of T. C.*, A. 1955 S.C. 160.

1. *Khem Chand v. Union of India*, A. 1958 S.C. 300 : (1958) S.C.R. 1080 (1096).

2. *Ahindra v. Gillot*, A. 1955 Cal. 543.

3. *State of Bombay v. Gajanan*, A. 1954 Bom. 351.



For example, if there was a *single* charge and the proposed punishment was a *single* punishment and the civil servant had the amplest opportunity at the enquiry stage to meet the whole case, a second opportunity may not be necessary.<sup>4,5</sup> In such cases, it was held that a combined notice calling upon the Government servant to show cause against the charge as well as against the proposed punishment of dismissal in case the charge was established, was good.

This view *no longer holds good* in view of the observations of the Supreme Court in *Khem Chand v. Union of India*,<sup>6</sup> to the effect that no question of showing cause against the punishment proposed can arise until the charge is established and that until then the competent authority must maintain an open mind with regard to the officer concerned. It is only after the inquiry is over, and the competent authority, after applying his mind to the gravity or otherwise of the charges and the evidence on the record, provisionally proposes to award a punishment, that the Government servant can be called upon to represent why the proposed punishment should not be inflicted.

#### What 'reasonable opportunity' implies.

1. Subject to the Proviso to Cl. (2), the Courts have jurisdiction to determine whether reasonable opportunity has been given in any case.<sup>7</sup>

2. The Court has to enquire whether reasonable opportunity has been offered to the civil servant at both the stages *viz.*, the inquiry stage when the charges against him were enquired into and the final stage when he was to show cause against the punishment provisionally proposed against him.<sup>8</sup>

3. Hence, an order of dismissal, removal or reduction would contravene Art. 31 (2), if—

(a) At the inquiry stage, the delinquent officer is not given 'reasonable opportunity' to defend himself, and to establish his innocence.<sup>9</sup>

(b) After the inquiry,—if a further opportunity to show cause against the punishment proposed is not given.<sup>10</sup>

(c) A combined notice is served upon the delinquent officer, embodying the charges as well as the punishment proposed.<sup>11</sup>

(A) *At the inquiry stage*.—'Reasonable opportunity' at this stage requires that

(a) the authority must (i) frame specific charges with the allegations on which they are based;<sup>12</sup> (ii) intimate those charges to the Government servant concerned;<sup>13</sup> (iii) give him an opportunity to answer those charges; (iv) give him an opportunity to defend himself against those charges by cross-examining witnesses produced against him and by examining himself or any other witnesses in support of his defence;<sup>14</sup> (v) after considering his answers take its decision;<sup>15,11</sup>

4. *Jotindra v. R. Gupta*, (1954) 58 C.W.N. 128 (133).

5. *Jyotinath v. State of Assam*, A. 1955 Assam 171.

6. *Khem Chand v. Union of India*, A. 1958 S.C. 300 : (1958) S.C.R. 1088.

7. *Secretary of State v. Lall*, A. 1945 F.C. 47 (57).

8. *Hukum Chand v. Union of India*, (1959) 1 S.C.A. 346 (351) : A. 1959 S.C. 536.

9. *High Commrs. v. Lall*, A. 1948 P.C. 121.

10. *Tribhuvannath v. Union of India*, A. 1953 Nag. 138.

11. *Bhugiram v. Supdt. of Police*, A. 1954 Assam 18 (22).

(b) the rules of natural justice should be observed in coming to the finding against the accused.<sup>12,14</sup>

Thus, there is no compliance with the rule—

(i) Where the inquiry is not directed against the alleged misconduct of the Government servant in question but is a general investigation to find out who is responsible for an accident or the like, without any charge against any particular person, and the penalty is proposed on the basis of such investigation.<sup>15</sup>

(ii) If a person is not apprised of the charge upon which it is proposed to take action, he is not in a position to defend himself and show cause against the proposed action.<sup>16</sup> On the same principle, the proceedings are vitiated if the punishing or appellate authority makes a confusion and finds the Petitioner guilty of the violation of a Departmental Rule for which he was never charged.<sup>17</sup>

(iii) If sufficient particulars of the misconduct with which he is charged are not given.<sup>18,20</sup>

The Supreme Court<sup>21</sup> has summarised the principles of natural justice thus—

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

Hence, the rules of natural justice are violated—

(a) Where the inquiry is confidential and is held *ex parte*,<sup>22,24</sup> or the witnesses are examined in the absence of accused officer,<sup>25,1</sup> even though he is subsequently offered an opportunity to cross-examine some of them;<sup>1</sup> or he is denied the right to call material<sup>2</sup> defence witnesses,<sup>3,4</sup> or to produce documents which were essential for the defence,<sup>5</sup> or to cross-examine the prosecution witnesses;<sup>6</sup> or he is not given sufficient time to answer the charges,<sup>4</sup> or the Inquiring Authority acts upon documents not disclosed to the accused officer.<sup>7</sup>

(b) Where the inquiring officer has a personal bias against the person charged.<sup>12</sup>

12. *State of U. P., v. Nooh*, (1958) S.C.R. 595 (601).

13. *John v. State of T. C.*, A. 1955 S.C. 160.

14. *Union of India v. Verma*, A. 1957 S.C. 882.

15. *Amalendu v. D. T. S.*, (1960) S.C. [C.A. 291/58].

19. *Sisir Kumar v. State of W. B.*, A. 1955 Cal. 183 (187).

20. *Krishna Gopal v. Director of Telegraphs*, (1956) 60 C.W.N. 602.

21. *Ananthanarayanan v. General Manager*, A. 1956 Mad. 220.

22. *Niranjan v. State*, A. 1960 All. 323 (331); *State of U. P. v. Salig Ram*, A. 1960 All. 543.

23. *Amiya v. Director*, (1955) 59 C.W.N. 932.

24. If, however, a preliminary confidential enquiry is held for the purpose of determining whether departmental proceedings should be drawn up or not, the delinquent Government servant has no right to participate therein [*Umer v. Inspector-General*, A. 1957 All. 767].

25. *Raishnab v. State of Orissa*, A. 1957 Orissa 70 (72).

1. *Bimal v. State of Orissa*, A. 1957 184 (188).

2. *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (245-6).

3. *Lalta Prasad v. Inspector-General*, A. 1954 All. 438; *Ayya Gounder v. State of Madras*, (1954) 2 M.L.J. 49 n.; *Gopinath v. State*, A. 1960 Ker. 65.

4. *Jageram v. State of M. P.*, A. 1955 Nag. 160 (163).



The above requirements may be considered separately—

(a) The delinquent officer should have the opportunity of defending himself and of adducing all relevant evidence on which he relies.

This right is denied where he is not allowed to call defence witnesses.<sup>5,6</sup>

The Enquiry Officer may refuse to call a witness whose evidence is irrelevant to the charges, but he has no right to refuse to call a witness asked for by the delinquent officer merely on the ground that the witness is a high official or that the witness being himself a dismissed official, his evidence would be unreliable.<sup>7</sup>

Although the Enquiry Officer has no power to compel the attendance of witnesses cited by the delinquent officer, by issuing summons or the like, nor the legal obligation to do so, where such witnesses are the employees of the Department and within the control of the Department, an effort must be made to assist the delinquent by extending all possible help for the production of such witnesses.<sup>8</sup>

(b) The delinquent should be given a reasonable opportunity of cross-examining the witnesses who are examined for the prosecution for the departmental inquiry<sup>9</sup>, and should be supplied copies of the statements of such witnesses, for the purpose of enabling him to make an effective cross examination.<sup>10,11</sup>

(c) For the same reason, there is a contravention of Art. 311 (2) where either the inquiring officer<sup>12</sup> or the authority making the ultimate order<sup>13</sup> gives evidence in the proceeding to establish the guilt of the person charged; or the inquiry is held by a person against whom the person charged has made allegations and who is, accordingly, interested in taking action against the latter, at any cost.<sup>14</sup>

Where there is an allegation against a superior officer he should not hold the inquiry himself nor direct it to be held by an officer who is subordinate to him.<sup>15</sup>

Similarly, there is a violation of natural justice where the inquiring officer acts upon evidence taken by some other person;<sup>16</sup> or the inquiry is held by a person who has already prejudged the person charged.<sup>17</sup>

On the other hand—

(d) 'Reasonable opportunity to show cause' does not necessarily include any right to personal hearing, or any right to be asked whether personal hearing is desired.<sup>18</sup> If, however, on receipt of the notice of inquiry, the delinquent officer makes a request for personal hearing,

5. *Lalla Prasad v. Inspector-General*, A. 1954 All. 438.

6. *Jageram v. State of M. P.*, A. 1955 Nag. 160 (163).

7. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126.

8. *Krishna Gopal v. Director of Telegraphs*, (1956) 60 C.W.N. 692 (698-9).

9. *Khem Chand v. Union of India*, A. 1958 S.C. 300.

10. *Sharmanand v. Supdt.*, A. 1960 M.P. 178.

11. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126.

12. *James v. Collector*, A. 1959 Orissa 152 (155).

13. *State of U. P. v. Md. Nooh*, A. 1958 S.C. 86 (91).

14. *Shivanandan v. State of W. B.*, (1955) 59 C.W.N. 794 (799).

15. *K. S. Rao v. State of Hyderabad*, A. 1957 Andhra 414 (417);

*Joti Parshad v. Supdt. of Police*, A. 1958 Punj. 327.

16. *Choudhary v. Union of India*, A. 1956 Cal. 662.

17. *Amulya v. Bokshi*, A. 1958 Cal. 470.

18. *Narayana v. State of A. P.*, A. 1958 636 (637).

19. *Balshuab v. State of Orissa*, A. 1959 Orissa 70 (73).

19a. Cf. *F. N. Roy v. Collector of Customs*, A. 1957 S.C. 648; *Union of India v. Verma*, A. 1957 S.C. 882.

that should be complied with.<sup>20</sup> At any rate, where the notice itself states that if the officer wanted a personal hearing it would be allowed, a subsequent denial of personal hearing when sought by the Petitioner might amount to a denial of reasonable opportunity within the meaning of Art. 311 (2), for, it is reasonable to expect that on account of the statement in the notice the petitioner framed his written explanation or representation in such a way that it would require explanation by him personally before the authority.<sup>21</sup>

(ii) Ordinarily, there is no right to be represented or assisted by a lawyer, in departmental inquiries.<sup>22</sup> But in particular circumstances, the rules of natural justice may require that the person charged should have professional help if he so desires, e.g., where the subject-matter is technical (as where the person charged challenges the opinion of a medical board) or where he has a substantial allegation of bias against the inquiring officer.<sup>23,24</sup>

(iii) The right to examine witnesses does not imply that the witnesses must be examined according to the procedure laid down in the Evidence Act. Hence, an inquiry is not vitiated by the mere fact that the witnesses called by the accused officer were examined by the Inquiry Officer and that the accused was not allowed to put questions to them by way of examination-in-chief.<sup>25</sup>

(iv) Similarly, once the opportunity to cross-examine the Government witnesses is given, the requirement of Art. 311 (2) is satisfied and the Government servant cannot insist that he would postpone his cross-examination till all the witnesses were examined which would necessitate the calling of the Government witnesses a number of times.<sup>1</sup>

(B) *After the inquiry*,—a further opportunity to show cause against the punishment proposed must be given.<sup>2</sup>

1. This requires that the competent authority, after the inquiry is over, and after applying his mind to the gravity or otherwise of the charges proved against the Government servant, tentatively proposes to inflict one of the three punishments specified in cl. (2) of Art. 311, communicates the same to the Government servant and gives him a reasonable time<sup>3</sup> and opportunity to make his representation why the proposed punishment should not be inflicted on him.<sup>4</sup>

2. Hence, the authority requiring the Government servant to show cause should communicate to him not only (a) the punishment proposed but also (b) the reasons for coming to that conclusion,<sup>5,6</sup> including the findings on the charges held proved, indicating the punishment proposed on each of such charges.<sup>7</sup> Where the punishing authority is different from the enquiring officer, the notice must state with what findings of the enquiring officer the punishing authority agrees or disagrees and why.<sup>8</sup>

20. *Narayandas v. Board of Revenue*, A. 1956 Orissa 219.

21. *Haque v. Board of Revenue*, A. 1956 Orissa 103 (105).

22. *Laxmi Narain v. Puri*, A. 1954 Cal. 335; *Veeraswamy v. Prov. of Madras*, A. 1948 Mad. 379.

23. *Verma v. Verma*, A. 1958 All. 532 (544).

24. *K. S. Rao v. State of Hyderabad*, A. 1957 Andhra 414 (418).

25. *Union of India v. Varma*, A. 1957 S.C. 882.

1. *Jagdish v. State of U. P.*, A. 1957 All. 438 (437).

2. *High Commrs. v. Lall*, A. 1948 P.C. 121.

3. *Khem Chand v. Union of India*, A. 1958 S.C. 300 (307).

4. *State of Andhra v. Ramayya*, A. 1957 Andhra 370 (372).

5. *Bimal v. State of Orissa*, A. 1957 Orissa 184 (188).

6. *Jagann v. State of Madras*, A. 1957 Andhra 197 (200).

7. *Ramchandra v. D. I. G.*, A. 1957 M.P. 126 (132).



But where the inquiry was by a Tribunal constituted under the Rules and the Government, issuing the notice, simply referred to the report of the Tribunal, held, that it showed that Government had agreed with the findings of the Tribunal,<sup>8</sup> and that the punishment proposed in the report is the punishment proposed to be inflicted by the competent authority.<sup>9</sup>

3. Where the action proposed is based on the report of an inquiry officer, a copy thereof should be supplied to the delinquent officer (see p. 587, *post*).

4. At the second stage, the delinquent Government servant is entitled to contend—

(a) That the inquiry at which the findings were arrived at was vitiated by a breach of the principles of natural justice.<sup>4</sup>

(b) That the findings are not supported by the evidence in the proceedings,<sup>4,10,11</sup> or that the evidence against him is not worthy of credence<sup>12</sup> or that he is not guilty of any misconduct to merit any punishment at all.<sup>13</sup>

(c) That the punishment proposed could not be properly awarded on the findings arrived at,<sup>13,14</sup> that is to say, the charges proved do not require the particular punishment proposed to be awarded.<sup>15</sup>

It follows, therefore, that where the notice to show cause at the second stage specifically states that the Petitioner would be heard *only* with regard to the quantum of punishment, reasonable opportunity in compliance with Art. 311 (2) has not been given to the Petitioner and the order of dismissal or removal must be set aside.<sup>16</sup>

5. Reasonable opportunity at this stage requires that the person should be asked to show cause against the punishment that has been provisionally determined upon the finding at the inquiry stage.<sup>14</sup> This provision has been clarified by the Supreme Court<sup>16,17</sup> and the following propositions may be gathered from the observations of the Supreme Court:

(a) Where an administrative tribunal which inquired into the charges recommended that the services of the delinquent officer be dispensed with and a notice is served upon him by the Government, with a copy of the report of the tribunal, and directing him to show cause why "the proposed punishment" should not be inflicted upon him, it cannot be urged that the notice was not in conformity with Art. 311 (2) because it did not mention the *specific* penalty of 'removal from service', because in the context of the copy of the report served upon him, it was clear to him that it was the penalty of removal that was being proposed.<sup>14</sup>

(b) It is not necessary as was supposed in some cases,<sup>18</sup> that only one punishment should be mentioned in the notice. The notice would not be vague merely because all the three penalties referred

8. *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (251).

9. *State of Orissa v. Govindadas*, (1958) S.C. [C.A. 412/58].

10. *State of Andhra v. Ramayya*, A. 1957 Andhra 370 (372).

11. *Jagdishprasad v. State*, A. 1957 M.B. 15 (17).

12. *Khemchand v. Union of India*, A. 1958 S.C. 300 (307).

13. *Jatindra v. Union of India*, (1957) 61 C.W.N. 815 (828).

14. *High Commrs. v. Lall*, A. 1948 P.C. 121 (126).

15. *State of M. P. v. Laddi Saran*, A. 1958 M.P. 326 (330).

16. *State of Orissa v. Govind Das*, (1958) S.C. [unrep.].

17. *Hukum Chand v. Union of India*, A. 1959 S.C. 536.

18. Cf. *Jatindra v. R. Gupta*, (1953 C.W.N. 128; *Lakshminarayan v. Puri*, A. 1954 Cal. 335.

to in Art. 311 (2) are specified (in the alternative) in the notice; on the other hand, it would give a fuller opportunity to the Government servant to show cause why none of the three punishments should be imposed on him.<sup>19</sup>

(c) Where a graver punishment is proposed in the notice, it is competent for the authority to award a *lesser* punishment.<sup>19,20</sup>

On the other hand,—

(i) There is a failure to comply with Art. 311 (2) where the notice is of such a character as to lead to the inference that the authority did not apply its mind<sup>21</sup> to the question of punishment to be imposed on the Government servant, e.g., where the notice called upon the Government to show cause why “disciplinary action, such as reduction in rank, withholding of increments *etc.*” should not be taken against him;<sup>22</sup> or where, instead of specifying two penalties in the alternative, one penalty is specified in one part of the notice and another penalty is specified in another part of the notice.<sup>23</sup>

(ii) Where the punishment proposed in the notice is of a lesser kind, a graver form of punishment cannot be imposed by the authority.<sup>24</sup>

Thus, if the notice asks the civil servant to show cause why he shall not be ‘removed’, the punishment of ‘dismissal’ cannot be awarded without offering further opportunity to show cause against the penalty of dismissal,<sup>25</sup> but if the notice asked the civil servant to show cause why he should not be ‘dismissed’, the punishment of removal may be awarded without any further formality. But on a notice to show cause against ‘dismissal’ or ‘removal’, the penalty of ‘reduction in rank’ cannot be awarded, for the penalty is different in nature and the plea of the civil servant may be somewhat different in the two cases.

(iii) But there is nothing to bar the issue of a fresh notice proposing a graver punishment at any time before the final order is passed.<sup>26</sup>

7. It has further been held<sup>27</sup> that if the punishing authority, in determining the quantum of punishment, takes into consideration some material of which the Government servant was not given any notice, e.g., his service record, there would be a contravention of Art. 311 (2), unless the Government servant himself asks for a consideration of his service record.<sup>28</sup>

### Obligation to supply copy of enquiry Officer.

1. A copy of the findings of the enquiring officer<sup>29</sup> or an adequate summary thereof must, therefore, be supplied to the person concerned

19. *Hukum Chand v. Union of India*, A. 1959 S.C. 536.

20. *Dayanidhi v. Mohanty*, A. 1955 Orissa 33.

21. *State of Orissa v. Govind Das*, (1958) S.C. [C.A. 238/58].

22. *Lakshmi Narayan v. Puri*, A. 1954 Cal. 335.

23. *Jalindra v. R. Gupta*, (1953) 58 C.W.N. 128.

24. *Dayanidhi v. Mohanty*, A. 1955 Orissa 33.

25. *Prasada Rao v. D. T.S.*, A. 1960 A.P. 618.

1. *Gapalrao v. The State*, A. 1954 Nag. 90; *Ramchandra v. D. I. G.*, A. 1957 M.P. 126 (133); *Kameswar v. State of Orissa*, A. 1956 Orissa 99 (102); *Nanjundeswar v. State*, A. 1960 Mys. 158 (162).

2. *Dulal v. Bose*, (1958) 62 C.W.N. 531.

3. A single Judge of the Allahabad High Court [*Maqbul v. Jawad*, A. 1959 All. 624] has held that a previous offence being known to the delinquent officer, no notice of it need be given if it is taken into consideration solely for awarding the punishment.

4. *Jalindra v. R. Gupta*, (1953) 58 C.W.N. 128 (132).

5. *Bimal v. State of Orissa*, A. 1957 Orissa 184 (188).



when it is proposed to punish him *on the results* of the enquiry, or *on the findings* contained in any report.<sup>10,7</sup>

Broadly speaking, the rules of natural justice require that the persons discharged must be apprised of all the statement or reports upon which the order of discharge is based,<sup>8</sup> and which indicate the grounds on which the order of removal was recommended.<sup>9</sup>

## 2. But—

(a) Where the action proposed is *not* based on a report the omission to supply a copy thereof to the delinquent will not vitiate the proceedings.<sup>10</sup> He cannot complain if copy of a preliminary report which is not taken into consideration at the departmental inquiry is not supplied to him.<sup>11</sup>

(b) Where the copy of the report supplied to the delinquent is *not complete*, it is to be determined whether he has been prejudiced by the absence of the omitted portion<sup>12</sup> for the purpose of being informed of the grounds upon which action is proposed to be taken against him.<sup>13</sup>

(c) There is no right to a disclosure of confidential or secret documents, such as those of the Anti-Corruption Department; it is sufficient compliance with the principles of natural justice if the substance of such reports is communicated to the delinquent.<sup>11,12</sup>

## Inquiry under the Public Servants (Inquiries) Act, 1850.

1. This Act makes a statutory provision for making "inquiries into the behaviour of public servants who are *not removable from their appointment without the sanction of Government*". It is, however, not obligatory on the part of the Government to proceed under this Act when Government proposes to take action against a public servant of the aforesaid class, for misbehaviour. This is a mere enabling provision and it is left to the option of Government whether the inquiry should be held under this special procedure or under the ordinary procedure.<sup>14</sup> The scope of the proceeding under this Act is only to make a fact-finding inquiry in order to enable Government to determine provisionally the punishment that should be imposed upon the

6. *Sisir Kumar v. State of W. B.*, A. 1955 Cal. 183 (188).

7. The observations in *Ranbir v. Supdt.*, A. 1957 All. 274 to the effect that the petitioner has no right to challenge the findings of the Enquiry Officer and that there is no obligation to furnish to the delinquent officer a copy of the report of the Court of Inquiry if he is informed of the item of charge which has been found proved against him are, it is submitted, not sound. The decision in the case may, however, be supported on the ground that when the delinquent actually showed cause in answer to the second notice, he made no grievance of the fact that he could not show or make a proper representation against the action proposed, without a copy of the report of the Court of Inquiry or Enquiring Officer. Where he raised no such objection at the proper stage, he cannot be heard on this point for the first time by the Court. [*Kartick v. D. T. S.*, A. 1957 Pat. 676 (678)].

8. *Gopikishore v. State of Bihar*, A. 1955 Pat. 372.

9. *Ramesh v. State of U. P.*, A. 1959 All. 47.

10. *Atindra v. Gilot*, (1955) 59 C.W.N. 835 (848) : A. 1955 Cal. 543.

11. *Sharmanand v. Supdt.*, A. 1960 M.P. 178.

12. *Lakshmi Narayan v. Puri*, A. 1954 Cal. 335 (388).

13. *Punil v. State of Bihar*, A. 1957 Pat. 357 (360).

14. *Venkataraman v. Union of India*, A. 1954 S.C. 375.

public servant, prior to giving him reasonable opportunity of showing cause, as is required by Art. 311 (2) of the Constitution.

2. The Commissioners appointed under this Act do not constitute a judicial tribunal, though they possess some of the trappings of a Court. The findings of the Commissioners upon each of the charges are mere expression of opinion and do not partake of the nature of a judicial pronouncement, and Government is free to take any action it likes upon the report. A proceeding under this Act does not, for the same reasons, constitute a 'prosecution and punishment' for the purposes of Art. 20 (2) of the Constitution,<sup>15</sup> nor does it dispense with the requirements of Art. 311 (2), as already pointed out.

### How the requirement of Art. 311 (2) is satisfied.

1. Once the opportunity to show cause is given, the constitutional requirement is satisfied.<sup>16</sup>

2. If the officer does not avail of the opportunity to show cause<sup>16,17</sup> but throws himself on the mercy<sup>18,19</sup> of his departmental heads or tenders unqualified apology<sup>20,21</sup> or resignation, he is not entitled to relief on the ground that his services have been terminated in contravention of Art. 311 (2).

3. If, at the enquiry stage, the officer is given an opportunity to adduce evidence and cross-examine witnesses but he then does not avail himself of that, he cannot, at a later stage of the proceeding complain that there was no compliance with Art. 311 (2).<sup>19, 22</sup> The position is the same where the officer is given an opportunity of being heard in person but he goes on unreasonably insisting upon his demand for representation by a lawyer and does not appear in person when that demand is rejected. In such cases, the Enquiring Officer is entitled to proceed *ex parte*.<sup>23</sup> Similar is the case where the officer goes on unreasonably applying for time and does not show cause after a frivolous application for time is rejected.<sup>19</sup>

But where a preliminary inquiry under r. 55 of the Civil Services (Classification, Control and Appeal) Rules is held before a departmental inquiry under Art. 311 (2), the fact that the delinquent officer failed to give his defence does not debar him from defending himself at the inquiry under Art. 311 (2).<sup>24</sup>

4. If he has been given a reasonable opportunity of defending himself at the inquiry stage, he cannot, at the second stage claim that another opportunity should be given to him to examine or cross-examine witnesses or to reopen the case.<sup>17, 25</sup>

Hence, if, at the inquiry stage, the officer did not ask for the copy of a Police report nor complain that he was unable to meet the charges without the copy, he cannot, at the second stage, contend that he cannot show cause against the action proposed for want of the copy of the report.<sup>15, 2</sup>

15. *John v. State of T. C.*, A. 1955 S.C. 160.

16. *Waman v. State of M. P.*, A. 1953 Nag. 69.

17. *Dinabandhu v. State of Orissa*, A. 1960 Orissa 26 (28).

18. *Nizamuddin v. State*, A. 1952 H.P. 43 (45).

19. *Naubat Rai v. Union of India*, A. 1953 Panj. 137 (141).

20. *Meghraj v. Rajasthan*, A. 1956 Raj. 28.

21. *Mohindra v. State of H. P.*, A. 1953 H.P. 125.

22. *Ranga Rao v. Director*, A. 1957 Orissa 21.

23. *Lakshmi Narayan v. Puri*, A. 1954 Cal. 335 (337).

24. *Dadarao v. State of M. P.*, A. 1958 Bom. 204.

25. *Kapur Singh v. Union of India*, A. 1956 Panj. 58 (64).

1. *Jagaroo v. State of Madras*, A. 1957 Andhra 197.

2. *Jalindra v. Union of India*, (1957) 61 C.W.N. 815 (828).



5. When an order of dismissal is challenged as being in contravention of Art. 311 (2), what the Court has to see is whether the Government servant was afforded a reasonable opportunity of showing cause against the action proposed to be taken against him and it is immaterial whether Government adopted one particular procedure or the other in making that order.<sup>3</sup> A proceeding under the Public Servants (Enquiries) Act, 1950, for instance, is nothing but a means to help the Government to come to a definite conclusion.<sup>4</sup>

6. If the order complained of is based on a proceeding which satisfies the requirements of Art. 311 (2), the Petitioner cannot complain if the Government had made an earlier confidential inquiry in order to determine whether formal proceedings should be drawn up against him. If, however, the report of that confidential inquiry are sought to be used in the proceeding, the Petitioner must be given full opportunity of meeting the allegations contained therein.<sup>5</sup>

#### Effect of non-compliance with Art. 311 (2).

1. Both Cls. (1) and (2) of Art. 311 are mandatory. They constitute express provisions of the Constitution which qualify Cl. (1) of Art. 310. Hence, dismissal by an authority lower than the appointing authority, and dismissal without giving reasonable opportunity of showing cause, are equally void and inoperative, and therefore, actionable.<sup>6</sup>

2. Where there is a failure to comply with Art. 311 (2) at the original stage, the order of punishment becomes null and void and nothing done by the appellate authority can cure the illegality.<sup>7</sup>

#### Remedies for violation of Art. 311.

1. According to the Supreme Court decision in *Abdul Majid's case*<sup>8</sup> in case of a wrongful termination of service in contravention of the constitutional requirements in cl. (1) or (2) of Art. 311, the aggrieved Government servant is entitled to relief in a Court of law like any other person, under the ordinary law, inasmuch as the doctrine of 'service at pleasure' has been subjected to constitutional limitations in India. Such relief must be regulated by the Code of Civil Procedure. It follows, therefore, that when a Government servant has been dismissed in contravention of either cl. (1) or cl. (2) of Article 311, he would be entitled to bring a suit against the Government for the following reliefs:<sup>9</sup>

(i) A declaration that the order of dismissal was void and inoperative and that the plaintiff remained a member of the service at the date of institution of the suit.

(ii) A decree for arrears of pay since the order of dismissal up to the date of institution of the suit.

(iii) A decree for damages for premature termination of his service in contravention of constitutional provisions [see p. 591, *post*].

2. A suit would also lie where the services are terminated in contravention of the contract of employment.<sup>10</sup>

#### Declaration that the order of dismissal was void.

1. Under the ordinary law of specific relief contained in s. 42 of the Specific Relief Act, 1877, any person whose legal character or right

3. *Kapur Singh v. Union of India*, A. 1956 Punj. 58.

4. *Venkataraman v. Union of India*, (1954) S.C.R. 1150 (1160).

5. *Tripathi v. State of Bihar*, A. 1960 Pat. 116.

6. *State of Bihar v. Abdul Majid*, (1954) S.C.R. 786; *Union of India v. Varma*, A. 1957 S.C. 882 (884).

7. *Bhugram v. Supdt. of Police*, A. 1954 Assam 18.

8. *Satis Chandra v. Union of India*, (1953) S.C.R. 655 (660).

to any property has been denied by any person (including the Government) is entitled to bring a suit for declaratory relief, in compliance with that section. Hence, when the services of a civil servant have been terminated in violation of any statutory or constitutional provision, he may obtain a declaration from the civil court that—

"the order purporting to dismiss the Plaintiff was void and inoperative and that the Plaintiff remained a member of the service at the date of institution of his suit."

2. But the relief under s. 42 of the Specific Relief Act being discretionary, the Plaintiff cannot obtain such declaration as above where—

(a) the plaintiff has already reached the age of superannuation at the date of institution of his suit for the declaration,<sup>10</sup> or

(b) where in view of the plaintiff's age or state of health, no purpose would be served by restoring him to office.<sup>11</sup>

3. The period of limitation for the declaratory relief is 6 years under Art. 120 of the Limitation Act.<sup>12</sup>

### Effects of the declaration.

Though the Court cannot directly order reinstatement, it cannot be expected that the Government would act in a capricious manner, in utter disregard for the pronouncement of the Court that the dismissal was void and that, accordingly, the public servant must be deemed to have been all along in service. In such a case, therefore, it would be fit and proper for Government to correct the wrong done and to reinstate the person.<sup>13</sup>

### Recovery of arrears of pay.

From the decision of the Supreme Court in *Abdul Majid's*<sup>14</sup> case, it follows that—

1. A suit lies for recovery of arrears of pay<sup>15, 16</sup> and other allowances<sup>14</sup> to which he is legally entitled, by a Government servant for the period he was in office and until his service is lawfully terminated,<sup>17</sup> together with such sums as are due to him under the Rules of such Provident Fund.<sup>18</sup>

2. Where the Government has paid him at a rate lower than what was due to him according to the terms of his appointment, he can recover the balance by suit, with interest or damages.<sup>19</sup>

As regards 'dearness allowance', however, though a Government servant can bring a legal action for the recovery of dearness allowance which has already accrued,<sup>20</sup> he cannot bring any proceeding for enforcing his right to get dearness allowance at any particular rate prescribed by the Service Rules, the reason being that dearness allowance is a compassionate or *ex gratia* allowance and that the Government servant has no legal right to the allowance.<sup>21</sup>

9. *High Commrs. v. Lall*, A. 1948 P.C. 121.

10. *Cf. Fakir v. Chakravarti*, (1954) 58 C.W.N. 336 (341).

11. *Rangachari v. Secy. of State*, A. 1937 P.C. 27.

12. *Jagdish v. U. P. Govt.*, A. 1956 All. 114 (116); *Abdul v. Secy. of State*, A. 1943 Oudh 368.

13. *Cf. Om Prakash v. U. P.*, I.L.R. (1952) 2 All. 567 (568).

14. *State of Bihar v. Abdul Majid*, (1955) 1 S.C.R. 786.

15. *State of M. P. v. Mandawar*, A. 1954 S.C. 493.

16. *Jagdish v. U. P. Govt.*, A. 1956 All. 115 (117).

17. *Om Prakash v. State of U. P.*, A. 1955 S.C. 600.

18. *Jogesh v. Union of India*, A. 1954 Assam 17 (20).

19. *Jamini v. Union of India*, A. 1955 Cal. 45 (51).

20. *U. P. Govt. v. Tabarak*, A. 1956 All. 151 (152).

21. *State of M. P. v. Mandawar*, A. 1954 S.C. 493; (1952-4) 2 C.C.



3. The limitation for a suit for recovery of arrears of pay of a Government servant is three years from the time when the salary fell due, under Art. 102 of the Limitation Act. The result is that the plaintiff would be entitled to recover all arrears of pay which fell due to him within a period of three years before institution of the suit.<sup>22</sup>

4. The Proviso to s. 42 of the Specific Relief Act says that no Court shall make a declaration under that section where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Hence, as it has been now held by the Supreme Court that in case of wrongful dismissal the aggrieved civil servant is entitled to recover arrears of pay since the date of such dismissal by ordinary action against the Government, the plaintiff who brings a declaratory suit under s. 42 of the Specific Relief Act must necessarily claim recovery of arrears of pay so far as it has not already become barred by limitation.<sup>23</sup> For any claim of arrears subsequent to the institution of the suit for declaration up to the date when a valid order of dismissal is eventually made, plaintiff may bring a separate suit.<sup>24</sup>

5. Though a declaration that a Government servant's dismissal was illegal cannot be obtained on his death by his legal representatives, where a suit was duly instituted by the Government servant for a declaration and recovery of arrears of pay, etc. and he died during the pendency of the proceedings, his legal representatives are entitled to a decree for the arrears up to the date of the plaintiff's death upon the finding that the dismissal was void.<sup>25</sup>

#### Whether damages can be had for wrongful dismissal.

1. The observations of the Supreme Court in *Abdul Majid's case*<sup>1</sup> to the effect that in India, the theory that service is held at the pleasure of the Government is subject to statutory or constitutional requirements and that in case of violation of these requirements—

"the Government servants are entitled to relief like any other person under the ordinary law"

suggest the conclusion that in case of a dismissal in contravention of the provisions of Art. 311(2), the aggrieved Government servant would be entitled to recover damages for wrongful dismissal as a private employee would have been entitled.<sup>2</sup>

2. The measure of damages, ordinarily, would be salary for such period as would reasonably be sufficient to enable the employee to secure an alternative employment.<sup>3,4</sup>

#### Whether remedy under Art. 226 lies for wrongful dismissal in contravention of Art. 311(2).

1. *Certiorari*.—Since the decision of the Supreme Court in *John v. State of T. C.*<sup>5</sup> it may be taken as settled that Art. 311(2) requires a hearing which conforms to the principles of natural justice and accordingly, *certiorari* lies for quashing the order passed in a departmental inquiry which violates the principles of natural justice or denies 'reasonable opportunity'. Not only have the High Courts<sup>6</sup> enter-

22. *Punj. Prov. v. Tarachand*, A. 1947 F.C. 23.

23. This point does not appear to have been considered in *Qamarali v. State of M. P.*, A. 1959 M.P. 47.

24. *Cf. Suraj Narain v. N.W.F.P.*, (1942) F.C.R. 113.

25. *Cf. Jagdish v. U. P. Govt.*, A. 1956 All. 114 (117).

1. *State of Bihar v. Abdul Majid*, (1955) 1 S.C.R. 786.

2. See also *Brahmbhatt v. State of Bombay*, A. 1956 Bom. 351; *Banarasi v. U. P. Govt.*, A. 1959 All. 393.

3. *Prabhulal v. Dt. Bd.*, A. 1938 All. 276.

4. *Satyendra v. Administrator*, (1958) 63 C.W.N. 250 (252).

5. *John v. State of T. C.*, A. 1955 S.C. 160.

tained applications under Art. 226 for *certiorari* for violation of Art. 311 (2), but the Supreme Court<sup>12</sup> has disposed of appeals from such proceedings, without questioning the maintainability of the applications.

*Certiorari* has also been granted where an appellate authority enhanced the punishment awarded by the competent authority, having no jurisdiction under the rules to enhance the punishment.<sup>13</sup>

II. *Mandamus*.—(1) *Mandamus* is not issued to compel reinstatement to a post which is held at pleasure. From this, it has been held that *mandamus* is not available in case of wrongful dismissal in violation of Art. 311 (2),<sup>14</sup> so as to compel the Government to reinstate the Petitioner.

8. But *mandamus* can be issued in cases of dismissal in contravention of cl. (1) or (2) of Art. 311, in the negative form,—directing the Respondent 'not to give effect to the order of dismissal. . . .'<sup>15,16</sup>

*Mandamus* has, however, been more freely issued against orders other than of dismissal, e.g., to quash an order of suspension made in contravention of the statutory rules relating to suspension<sup>17</sup> or made by an authority who was not competent under the law to issue such order;<sup>18</sup> to direct the proper authority to deal with a departmental appeal when it had been disposed of by an officer who was not competent to deal with it, under the Rules.<sup>19</sup>

III. *Prohibition*.—A Single Judge of the Bombay High Court<sup>20</sup> has also issued a writ of *Prohibition* against a departmental inquiry which was initiated by an unauthorised person.

#### Scope of inquiry in a proceeding for *certiorari*.

1. The only question that the Court may determine in an application under Art. 226 against an order of illegal dismissal or reduction in rank is whether the provisions of Art. 311 have been complied with. It cannot go into the merits of the findings at the departmental inquiry and discuss whether the charges were fully established<sup>21</sup> or whether the punishment was too severe.<sup>22,23</sup>

6. *Kashinath v. Kapilla*, A. 1952 Orissa 285; *Tribhuvan v. Union of India*, A. 1953 Nag. 138; *Brojo Gopal v. Commr. of Police*, (1955) 59 C.W.N. 628; *Gopi Kishore v. Bihar State*, A. 1955 Pat. 372; *Bhugram v. Supd. of Police*, A. 1954 Assam 18 (22); *Lalla Prasad v. Inspector-General*, A. 1954 All. 438; *Shantaram v. Chudasama*, A. 1954 Bom. 361 (363).

7. *Shyamlal v. State of U. P.*, (1952-54) 2 C.C. 592; (1955) 1 S.C.R. 26.

8. *Dalmer v. State of Punjab*, (1957) S.C. [unreported].

9. *Union of India v. Varma*, A. 1957 S.C. 882.

10. *State of U. P. v. Nooh*, (1958) S.C.R. 595 (601).

11. *Poonamram v. State of Rajasthan*, A. 1960 Raj. 56.

12. *Lilawati v. State of M. B.*, A. 1952 M.B. 105.

13. *Krishna Gopal v. Director of Telegraphs*, (1956) 60 C.W.N. 692.

14. *Venkateswarrao v. State of Madras*, A. 1954 Mad. 1043.

15. *Hemanta v. S. N. Mukherjee*, (1954) 58 C.W.N. 1; *Surya Kumar v. Banerjee*, (1954) 58 C.W.N. 656.

16. *Baldev Singh v. Govt. of Pepsu*, A. 1954 Pepsu 98.

17. *Rabindra v. Manager, E. Ry.* (1955) 59 C.W.N. (869).

18. *Shantaram v. Chudasama*, A. 1954 Bom. 361.

19. *Prakasa Rao v. Govt. of A. P.*, A. 1960 A.P. 15.

20. *Damodar v. State of Orissa*, A. 1957 Orissa 74 (75).

21. *Sharif Khan v. Onkar Singh*, A. 1957 All. 217.

22. *Dinabandhu v. State of Orissa*, A. 1960 Orissa 26.



2. Once the rules of natural justice are found to have been complied with, the Court will not enter into the scrutiny of the evidence and the finding of the Enquiry Officer, as if sitting in appeal,<sup>23</sup> even where it is alleged to be based on no evidence.<sup>23a</sup>

#### General grounds for refusing relief under Art. 226.

(a) Where the termination of service takes place under the terms of a contract, relief under Art. 226 is not available even though there is some irregularity in using the contractual power. A suit for damages may lie in such cases.<sup>24, 25</sup>

(b) The relief under Art. 226 being discretionary, it will not be granted where—

(i) The Petitioner comes to Court after reaching the age of retirement.<sup>26, 27</sup>

(ii) The Petitioner accepts the order of termination of service in terms of contract and accepts all his dues and then comes to Court only a long time thereafter.<sup>28</sup>

#### Whether relief under Art. 226 can be refused for violation of Art. 311, on the ground of existence of alternative relief.

1. Where the decision rests on disputed facts which cannot be satisfactorily determined without taking evidence, e.g., whether the Petitioner was prevented from cross-examining witnesses who gave evidence in support of the charge, the Court may, in the exercise of its discretion refuse to interfere under Art. 226, and refer the Petitioner to a suit.<sup>2</sup>

2. The question whether reasonable opportunity has been given to the Government servant within the meaning of Art. 311 (1) is ordinarily a question of fact.<sup>3</sup> But there may be cases where the question of reasonable opportunity may be so inextricably mixed up with the nature and content of the constitutional guarantee under Art. 311 (2) as to constitute a substantial question as to the interpretation of that Article,<sup>4</sup> e.g., where the constitutionality of a Departmental Rule is challenged.<sup>5</sup>

3. The Court would not refuse to have the petition under Art. 226 where a suit is already time-barred at the date of the Court's order.<sup>6, 7</sup>

#### Appeal.

From an order in a proceeding under Art. 226 for violation of Art. 311 (2), appeal has been entertained by the Supreme Court under Arts. 132 (2),<sup>8</sup> 133 (1) (c),<sup>9</sup> 136.<sup>8, 10</sup>

#### Remedies for breach of Service Rules.

A distinction should primarily be made between Rules which relate in disciplinary action against a civil servant and rules which confer upon him certain privileges or benefits or are merely directory.

23. *Dalmer Singh v. State of Punjab*, (1957) S.C. [unreported].

23a. *Haragovinda v. Kagti*, A. 1960 Assam 141.

24. *Bhagwandas v. Supdt.*, A. 1956 Pat. 23 (28).

25. *Subodh v. O'Callaghan*, A. 1956 Cal. 532 (537).

1. *Union of India v. Parshotam*, A. 1956 Punj. 207.

2. *Union of India v. Varma*, A. 1957 S.C. 882 (884).

3. *Krishnaswami v. Governor-General in Council*, A. 1947 F.C. 37.

4. *State of Mysore v. Chabani*, A. 1958 S.C. 325.

5. *Priya Gupta v. General Manager*, A. 1959 All. 463 (648).

6. *Babu Ram v. U. P. Govt.*,<sup>8</sup> A. 1958 All. 584 (587).

7. *State of U. P. v. Manbodhan*, A. 1957 S.C. 912.

8. *State of Bombay v. Subhagchand*, A. 1957 S.C. 892.

9-10. *Narasimhachar v. State of Mysore*, A. 1960 S.C. 248 (249).

(A) *Rules conferring privileges*.—These do not create much difficulty, for, whatever be the legal character of the Rules, where discretionary power is given to the administration to confer certain benefits or privileges, no legal right arises in favour of the Government servant. Hence, no legal action would lie to enforce his alleged right, e.g., that he is entitled to a particular seniority<sup>11,12</sup> or grade<sup>13</sup> or that he is entitled to dearness allowance at a particular rate,<sup>14</sup> or that he is entitled to be promoted.<sup>15,16</sup>

A violation of statutory Service Rules may, however, give rise to a cause of action if it causes injury to a legal right of the Government servant, e.g., right to property;<sup>17</sup> or violates some provision of the Constitution, e.g., Art. 14.<sup>18</sup>

(B) *Rules which are merely directory*.—All rules made under statutory authority are not mandatory. Thus, some of the rules contained in the U. P. Police Regulations, framed under the Police Act, 1861 are merely directory, and others which are not framed under any statutory authority. It is from the Regulations themselves that it is to be determined whether any particular rule has the force of law.<sup>19</sup>

Mandamus will lie if the Rule has the force of law<sup>20</sup> and relate to conditions of service other than the tenure of office which is at the pleasure of the Government.<sup>21</sup>

(C) *Rules relating to disciplinary action*.—Violation of these Rules create a more serious problem.

#### (I) Prior to the Constitution :

Under the Government of India Act, 1919, it was held<sup>22,23</sup> that the rules framed under s. 96B (2) did not fetter the power of the Crown to dismiss at pleasure, and that, accordingly, dismissal in contravention of these Rules did not give rise to any right of action in the Courts. These Rules were merely in the nature of administrative discretions and might be changed by Government at its pleasure at any time. Hence, the breach of these Rules did not give rise to any cause of action in a Court of law<sup>24</sup> and the only remedy lay in departmental appeal, e.g., under the Civil Services (Classification and Appeal) Rules.

#### (II) Under the Constitution :

There has been a difference of judicial opinion under the Constitution. A. On the one hand, it has been held<sup>25,26</sup> that it is only the violation of Art. 311 that gives rise to a cause of action enforceable in a Court of law. According to this view, where the violation of a rule

11. *Ram Saran v. Union of India*, A. 1954 Punj. 142.

12. *Devasahayam v. State of Madras*, A. 1958 Mad. 53 (67); *Mary v. State of T. C. A.* 1958 Ker. 85.

13. *Framji v. Union of India*, (1958) 60 Bom. L.R. 1302.

14. *State of M. P. v. Mandawar*, A. 1954 S.C. 493.

15. *Des Raj v. State of Punjab*, A. 1954 Punj. 134.

16. *Sheomohon v. State of M. P.*, A. 1957 Nag. 84.

17. *Madhavan v. State*, A. 1959 Ker. 338 (339).

18. *Niranjan Singh v. State of U. P.*, A. 1957 S.C. 142.

19. *Babu Ram v. U. P. Govt.*, A. 1958 All. 584 (586).

20. *Lachman v. Supdt.*, A. 1958 All. 345 (347).

21. *Rangachari v. Secy. of State*, I.L.R. (1937) Mad. 517 (530) P.C.

22. *Venkata v. Secy. of State*, A. 1937 P.C. 31.

23. *Secy. of State v. Lal*, A. 1945 P.C. 47.

24. *Krishnamoorthi v. State of Madras*, A. 1951 Mad. 882.

25. *Lilavati v. State of M. B.*, A. 1952 M.B.105 (109).

26. *Fribhawan v. State of Bihar*, A. 1960 Pat. 116 (122).



amounts to a denial of 'reasonable opportunity' within the meaning of Art. 311 (2), remedy lies for contravention of Art. 311 (2) itself and not for that of the rule.

Following the Privy Council decisions,<sup>11,12</sup> it has been held that the Rules framed under the Proviso to Art. 309 of the Constitution (or under s. 24 of the Government of India Act, 1935 or under s. 96B of the Government of India Act, 1919) are merely administrative rules for the guidance of officers in the matter of disciplinary action against Government servants or for regulating their conditions of service. For the violation of these Rules *not amounting to a contravention of Art. 311*,<sup>13</sup> the remedy is an appeal to the administrative authorities specified in these Rules, and not an action in the Courts.<sup>14,15</sup>

It has also been held<sup>17</sup> that the pleasure of the President or Governor under Art. 310 (1) is subject only to the 'provisions of the Constitution,' and not to Rules made or continued *under* the Constitution,—whether under Art. 309 or 313.

In some cases, this result has been arrived at by holding that any breach of the Rules not amounting to a violation of the rules of natural justice, would be treated as a *mere irregularity*, e.g., a joint trial<sup>18</sup> or investigation conducted by an officer different from the one mentioned in the Rules, and would not, accordingly, give rise to any cause of action.

Similarly, even if the State Government had no power to order an inquiry under the Public Servants (Inquiries) Act, 1850, the Court cannot, under Art. 226 quash the order of dismissal made in pursuance of the report of the Commissioner, if the inquiry was made giving the Government servant a reasonable opportunity and observing the rules of natural justice.<sup>19</sup>

B. On the other hand, it has been held in a number of cases<sup>20,21</sup> that the Rules framed under s. 241 (2) of the Government of India Act, 1935 have the force of law, and *mandamus* would, accordingly, issue for their enforcement as in the case of violation of other statutory rules, apart from any question of contravention of Art. 311.

There is much force in this contention now that the rules framed under the Government of India Acts are statutory rules because it has been assumed even by the Supreme Court<sup>22</sup> that these Rules are still in force by virtue of Art. 313, and Art. 313 would not have been applicable unless these Rules could be regarded as '*laws in force*'. Had they been mere executive instructions, Art. 313 would not have been attracted at all.<sup>23</sup>

11-12. *Venkata v. Secy. of State*, A. 1937 P.C. 31; *Rangachari v. Secy. of State*, I.L.R. (1937) Mad. 517 (530) P.C.

13. *Vardaraja v. State of T. C.*, A. 1953 T.C. 140.

14. *Naubat Rai v. Union of India*, A. 1953 Panj. 137 (141).

15. *Kesavan v. T. D. Board*, A. 1959 Ker. 21 (23).

16. *Laxman v. State of M. P.*, A. 1959 M.P. 295.

17. *Jagdish v. Accountant-General*, A. 1958 Bom. 283 (287). [See *contra Dwarakchand v. State of Rajasthan*, A. 1958 Raj. 38].

18. *Thakorjee v. State of Madras*, A. 1955 Andhra 168.

19. *Kapur Singh v. Union of India*, A. 1956 Panj. 58 (62).

20. *Chatterjee v. Mathur*, A. 1954 Cal. 187 (188).

21. *Baldev v. Govt. of Pepsu*, A. 1954 Pepsu 98.

22. *Waheed v. State*, A. 1954 Nag. 229 (231).

23. *Jagarao v. State of Madras*, A. 1957 Andhra 197; *State of A. P. v. Rameswara*, A. 1957 A.P. 794 (823).

24. *Bhugram v. Supdt. of Police*, A. 1954 Assam 18 (22).

25. *Kamta v. Post Master-General*, A. 1955 Pat. 381 (384); *Champra v. State of Bihar*, A. 1959 Pat. 382.

1. *Shyam Sunder v. State of Orissa*, A. 1957 Orissa 222.

In some cases,<sup>2</sup> it has been held that where the Rules prescribe a particular procedure to be followed in the matter of dismissal or removal, the non-compliance with such procedure will *ipso facto* constitute a failure to comply with Art. 311 (2). Of course, where the non-observance of the Rules has not caused any prejudice to the Government servant concerned, the Court may, in the exercise of its discretion, refuse to interfere, under Art. 226.<sup>3</sup>

Thus, *mandamus* has been issued against—

(i) Irregular order or suspension in contravention of Departmental Rules.<sup>4,5</sup>

(ii) An order of dismissal, removal or reduction in rank made on the report of an Inquiry Tribunal which had no jurisdiction to inquire into the case, according to the Rules which created the Tribunal.<sup>6</sup>

(iii) An order of punishment awarded in a departmental proceeding held in violation of the procedure laid down in the Rules,<sup>7-9</sup> e.g., dismissal without giving a *personal* hearing where the Rules provided for such hearing.<sup>10</sup>

(iv) An order of suspension<sup>11</sup> or disposal of a departmental appeal<sup>12</sup> by an officer who was not competent to deal with it, under the Rules.

(v) Reduction of pay or withholding of increment<sup>13</sup> or of pay<sup>13a</sup> under a Rule which did not authorise such punishment.

(vi) Discharge in terms of Rules which have been repealed or substituted.<sup>14</sup>

(vii) Dispensing with the services of an assessor (as required by the Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, in course of an inquiry by the Tribunal.<sup>15</sup>

(viii) Directing enquiry as to the correct date of birth of a Government servant where two dates appeared on his service roll and the authority compelled him to retire according to the earlier date, without making inquiry.<sup>16</sup>

C. So far as rules made under the Proviso to Art. 309 are concerned it is obvious that they have the force of law, having been made in exercise of power conferred by the organic law of the land. It is also to be noted that the power conferred by the Proviso is merely an *interim* substitute for provisions to be made by the Legislature in exercise of its legislative power.

According to the Rajasthan High Court,<sup>17</sup> the provisions of Art. 310 are subject not only to Art. 311 but also to Rules framed in exercise of the power conferred by Art. 309. But the Bombay<sup>18</sup> and Kerala<sup>19a</sup>

2. *Santosh v. Commr. of Police*, (1954) C.W.N. 756.

3. *Jagga Rao v. State of A. P.*, I.L.R. (1957) A.P. 715; *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (246).

4. *Chatterjee v. Mathur*, A. 1954 Cal. 187 (188).

5. *Baldev v. Govt. of Pepsu*, A. 1954 Pepsu 98.

6. *Rajagopala v. Madras State*, A. 1955 Mad. 183 (187).

7. *Wahed v. State*, A. 1954 Nag. 229 (231).

8. *Bhugram v. Supdt. of Police*, A. 1954 Assam 18 (22).

9. *Benimadhab v. State*, A. 1957 M.P. 118 (122).

10. *Santosh v. Commr. of Police*, (1954) 58 C.W.N. 756 (760).

11. *Rabindra v. Manager, E. Ry.*, (1955) 59 C.W.N. 859 (864).

12. *Saksena v. Director of M. & H. Services*, A. 1959 All. 629.

13. *Madhosing v. State of Bombay*, (1959) 61 Bom. L.R. 1537 (1548).

13a. *Suraj v. State of M. P.*, A. 1960 M.P. 303.

14. *Ramachandra v. State of Mysore*, A. 1960 Mys. 65.

15. *Ramchandra v. State of Orissa*, A. 1960 Orissa 58 (60).

16. *General Manager v. Yakub*, (1958) 2 M.L.J. 517.

17. *Dwarbhachand v. State of Rajasthan*, A. 1958 Raj. 38.

18. *Shankerlingam v. Union of India*, (1960) 62 Bom. L.R. 1 (7).



and Andhra<sup>18a</sup> High Courts hold the view that Rules made under the Constitution cannot be said to be included within the expression 'expressly provided by the Constitution' within the meaning of Art. 310 (1).

D. A suit will lie for wrongful dismissal where a Government servant has been dismissed<sup>19</sup> or retired<sup>20</sup> in contravention of Rules having a statutory force.

In recent Supreme Court decisions,<sup>21,22</sup> the Departmental Rules laying down the conditions of service have been treated on the same footing as a contract relating to a violation of Art. 311 (2), also, will be in the nature of a breach of contract, so that only a suit will lie therefor and no application under Art. 226. But once the Rules are acknowledged as having a statutory force, there is no reason why mandamus shall not lie to enforce such statutory Rules where there has been a clear contravention.<sup>23</sup>

E. Once it is held that these Rules have a statutory force, they must be interpreted by the Courts like other statutory instruments, regardless of the interpretation given in executive instructions.<sup>24</sup>

#### Proviso (a): 'Conviction on a criminal charge'.

1. This clause makes an officer who has been convicted on a criminal charge, liable to dismissal without any further proceeding under Art. 311 (2). No distinction is made between crimes involving moral turpitude and other crimes.<sup>25,1</sup> Thus, conviction for drunkenness would attract the operation of this Proviso.<sup>2</sup> According to the Assam High Court,<sup>3</sup> it extends to pre-appointment conviction alone; out that is debatable.

2. The word 'charge' in this clause contemplates some accusation and not merely a charge in the technical sense of the Code of Criminal Procedure. Hence, conviction for contempt of court, consisting in making defamatory accusations against the presiding officer of a Court is a conviction within the purview of the present clause, even though a contempt of this nature may not be an 'offence' under the Indian Penal Code.<sup>4</sup>

3. In a Madras case,<sup>5</sup> it has been held that Government is not bound to reinstate the Government servant if the conviction is eventually set aside by the Appellate Court. This view, it is submitted, overlooks the fact that the basis of the exception in Proviso (a) is that the person has been convicted. Where the conviction is set aside by the Appellate Court, the position at law is that he must be deemed to have never been 'convicted'<sup>6</sup> within the meaning of the Proviso, and, accordingly, Government must re-instate him upon such reversal and then proceed against him under Art. 311 (2), if so desired.

18a. *Neelakanta v. State of Kerala*, A. 1960 Ker. 279; *Hyder v. State of A. P.*, A. 1960 A.P. 479.

19. *Dominion of India v. Arulappan*, A. 1957 Mad. 356.

20. *State of Andhra v. Kameshwara*, A 1957 Andhra 794 (802, 823).

21. *Hartwell v. Uttar Pradesh Govt.*, A. 1957 S.C. 886.

22. *Parshotam v. Union of India*, A. 1958 S.C. 36.

23. Cf. *Nagendra v. Port Commrs.*, (1954) 58 C.W.N. 527 (533).

24. *Brijnandan v. State of Bihar*, 1955-Pat. 353.

25. *Durga Singh v. State of Punjab*, A. 1957 Punj. 97.

1. *Venkatarama v. Prov. of Madras*, A. 1946 Mad. 375.

2. *Jagadindra v. I. G.*, A. 1959 Assam 134.

3. *M. S. M. Ry. v. Rangā Rao*, A. 1940 Mad. 269.

4. This view of the Author, expressed at p. 515 of the Second Ed. of this book, now finds support from *Dibagh v. Dist. Supdt.*, A. 1959 Punj. 401; *Das v. Dist. Supdt.*, A. 1960 All. 538.

### **Criminal prosecution and departmental proceedings.**

1. There is nothing in the Constitution or in any law to oblige the State to institute a criminal prosecution instead of a departmental proceeding where a Government servant is alleged to have committed an offence which is punishable under the criminal law. It is at the option of the Government to proceed either under the criminal law or under the departmental rules, or, even to proceed under both simultaneously.

2. Proviso (a) to Art. 311 (2) shows that after the Government servant has already been convicted in a criminal proceeding, he may be dismissed or removed from service without any further departmental inquiry against him. But even where the Government servant has been acquitted in the criminal case, it is open to the Government to proceed against him departmentally on the same charge, after complying with Art. 311 (2). Such proceeding after acquittal by the Criminal Court is not barred by Art. 20 (2), inasmuch as a departmental proceeding does not constitute a 'prosecution' within the meaning of Art. 20 (2). [see p. 120, *ante*].

3. For the same reason, it is possible to prosecute a Government servant on a criminal charge, after he has been dismissed by departmental action, on the same charge.<sup>5</sup>

### **Proviso (b): Decision of the authority not to give opportunity.**

Under this Proviso, no opportunity to show cause need be given if the appointing authority records it in writing that it is reasonably practicable to give to that person an opportunity of showing cause. In order to apply this protection to the order of dismissal etc., the following conditions must be satisfied:

(i) The satisfaction must be that of the authority who is empowered to dismiss, remove or reduce the officer in rank and he must apply his mind to it. Where he simply carries out the orders of some superior authority and dismisses a subordinate outright, the validity of the order cannot be sustained on the ground that the power under the present Proviso was exercised.<sup>6</sup> As cl. (3) clearly says, there must be 'decision' of the authority empowered to dismiss, etc., and then the reasonableness of the decision will be immune from being challenged in a court of law.

(ii) The authority empowered to dismiss etc. must record his reasons in writing for denying the opportunity under cl. (2), before making the order of dismissal etc. After an order in contravention of Art. 311 (2) is made and challenged, it cannot be contended that the order is valid by reason of this Proviso.<sup>7</sup>

### **Proviso (c): "Interest of security of the State".**

There might be cases where the mere disclosure of the charge might affect the security of the State. In such cases the President or Governor might exempt the giving of notice to show cause, or the opportunity to defend, as required by Art. 311 (2).<sup>8</sup>

The satisfaction of the President under this clause is not justiciable,<sup>9</sup> and the Public Service Commission need not be consulted before making an order under the present clause of the Proviso.<sup>10</sup>

5. *Venkataraman v. Union of India*, (1952-54) 2 C.C. 296 : (1954) S.C.R. 1150.

6. *Bhugiram v. Supdt. of Police*, A. 1954 Assam 18 (22).

7. *Jagdish v. Accountant-General*, A. 1958 Bom. 283 (290); *Azam v. State of Hyderabad*, A. 1958 A.P. 619 (621).



**Railway Services (Safeguarding of National Security) Rules.**

1. An order of compulsory retirement under these Rules does not amount to 'dismissal' or 'removal' within the meaning of Art. 311.<sup>8,9</sup>

2. But when action is taken or proposed to be taken against an employee under these Rules, the Court can, under general principles, interfere on the following grounds—

(a) Where the charges made in the notice are so vague that it is not reasonably possible for the employees to meet them.<sup>10</sup>

(b) Where the termination of services is proposed in the notice itself, before the explanation of the employee is received.<sup>10</sup>

(c) Where the grounds for which the Rules are applied against a Government servant have no relevancy to the requirements of the Rules or when the Rules are used for a purpose other than for which they had been made.<sup>11</sup>

(d) Though it is not open to the Court to substitute its satisfaction for that of the State Government, the Court is entitled to examine the materials in order to ascertain whether the conclusion reached by the State Government could possibly and reasonably be reached.<sup>11</sup>

(e) Where the procedure prescribed by the Rules has not been followed.<sup>12</sup> Where the authority proceeds and takes action under the Security Rules but fails to follow the procedure laid down therein, the validity of the order cannot be maintained by invoking other Service Rules.<sup>12</sup>

Thus, the Rules cannot be relied upon unless there is a finding that after due inquiry under r. 4, the competent authority had come to the conclusion that retention of the particular employee in service was prejudicial to 'national security'.<sup>13</sup>

**Constitutionality of the Security Rules.**

It has been held that the National Security Rules do not offend Art. 14,<sup>12</sup> 19 (1) (c)<sup>12</sup> or 311.<sup>13</sup>

**Whether proceedings can be continued after retirement.**

Charges framed against a civil servant when he was in service may be continued after his retirement, and, under Art. 470 (b) of the Civil Service Regulations, Government is competent to reduce his pension, upon those charges after considering his representation.<sup>14</sup>

**312.** (1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States,<sup>15</sup> and, subject to

8. *Balakotaiah v. Union of India*, A. 1958 S.C. 232.

9. *Sambandan v. General Manager*, A. 1953 Mad. 54.

10. *Ananthanarayanan v. S. Ry.*, A. 1956 Mad. 220.

11. *Lachman v. I. G. P.*, A. 1956 Pepsu 19 (26).

12. *Balakotaiah v. Union of India*, A. 1958 S.C. 232 (236).

13. *Mohan Singh v. Day*, (1953) O.C.J. Misc. Application 38/53 (Bom.) referred to in *Shankertilgam v. Union of India*, (1959) 62 Bom. L. R. 1 (7).

14. *In re Salmani*, A. 1957 Mad. 612.

15. In its application to the State of Jammu and Kashmir, after the word 'States' the words '(including the State of Jammu and Kashmir)', shall be inserted.

the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

**'Parliament may by law'.**

These words do not mean that the rules regulating the recruitment or the conditions of service must be made by Parliament itself and that no delegation whatsoever is possible.<sup>16</sup> Delegation of the power to frame rules to carry out the purposes of an Act made by Parliament is not taken away by the words, even though the power to make such delegation has been expressly reserved in some articles by use of the words 'by or under any law made by Parliament'.<sup>17</sup>

**313.** Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

**Art. 313: Existing laws relating to the services.**

Under the Constitution, the Union and State Legislatures have power to make laws to regulate the respective Services under the Union and the State Government (Entries 70, List I and 41 of List II). But until such laws are made, the existing laws relating to the Services shall continue to be in force.

**'Laws in force'.**

1. 'Laws in force' include the rules framed under statutory powers, e.g., Rules framed under s. 266 (3) of the Government of India Act, 1935, or s. 96B of the Government of India Act, 1919.<sup>18</sup>

2. By virtue of this provision, the following Rules have been held to continue as 'laws in force'—

(a) Rules made under s. 96B, Government of India Act, 1919:

(i) The Fundamental Rules (1922).<sup>19</sup>

(ii) The Civil Services (Classification, Control and Appeal) Rules (1920).<sup>20, 21</sup>

(iii) The Civil Service Regulations, which were made sometime prior to 1914, do not appear to have been made in exercise of any statutory powers,<sup>22</sup> but they subsequently acquired statutory authority under s. 96B (4) of the Government of India Act, 1919.<sup>23</sup>

16. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (517).

17. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1343-4).

18. *Hirendra v. State of W. Bengal*, (1954) 59 C.W.N. 450 (454-5); *Balshnab v. State of Orissa*, A. 1957 Orissa 70 (72).

19. *Pradyat v. Chief Justice*, (1955) 2 S.C.R. 1331 (1343-4); *Venkataraman v. Union of India*, A. 1954 S.C. 375.

20. *Shyamlat v. State of U. P.*, (1955) S.C.R. 26 (32, 34).



(b) Rules made under s. 241 (2) of the Government of India Act, 1935 :

(i) The Central Services (Temporary Service) Rules, 1949.<sup>21</sup>

(ii) Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948.<sup>22</sup>

(iii) The Railway Establishment Code, made under s. 241 (2) of the Act of 1935.<sup>23</sup>

(iv) The Regulation made under s. 266 (3) of the Government of India Act, 1935, exempting certain cases from the requirement of consultation with the Public Service Commission.<sup>24</sup>

3. On the other hand, the following Rules or regulations have been held to have no force of law since they do not appear to have been made under any statutory authority :

(a) The Army Instructions No. 212, dated 25-6-49 were issued in pursuance of a Resolution of the Government of India (Military Department)—No. 2228, dated 22-12-17.<sup>25, 26</sup>

(b) Madras Public Service Commission Rules of Procedure.<sup>2</sup>

(c) The Manual of Government Orders.<sup>3</sup>

#### **'Until other provision is made . . .'**

Provisions have now been made with respect to the all-India Services by the making of comprehensive Rules in exercise of the powers conferred by s. 3 of the All-India Services Act, 1951 (see under Art. 312, *ante*). These Rules repeal 'all corresponding rules in force immediately before the commencement of these rules and applicable to members of these Services'. The Rules<sup>4</sup> are—

The Indian Administrative Service (Recruitment) Rules, 1954.

The Indian Administrative Service (Probation) Rules, 1954.

The Indian Administrative Service (Cadre) Rules, 1954.

The Indian Administrative Service (Regulation of Seniority) Rules, 1954.

The Indian Administrative Service (Pay) Rules, 1954.

The All India Services (Conduct) Rules, 1954.

The All India Services (Travelling Allowances) Rules, 1954.

The All India Services (Medical Attendance) Rules, 1954.

The All India Services (Compensatory Allowances) Rules, 1954.

The All India Services (Discipline and Appeal) Rules, 1955.

#### **'So far as consistent with this Constitution'.**

I. If any 'existing rule' be inconsistent with any provision of the Constitution, it cannot continue to be valid under Art. 313. Thus,

(i) R. 15 of the Police Regulations, 1915, is void on account of contravention of Art. 311 (1).<sup>5</sup>

(ii) For the same reason r. 758 of the Bengal Police Regulation is to be read subject to Art. 311 (2).<sup>6</sup>

(iii) R. 20 (c) of the Madras Civil Services (Classification, Control and Appeal) Rules which provides for an appeal from an order of

21. *Kamtacharan v. P. M. G.*, A. 1955 Pat. 311.

22. *Ghouse v. State of A. P.*, A. 1959 A.P. 497 (500).

23. *Shardaprasad v. Divisional Supdt.*, (1959) 61 Bom. L.R. 1596.

24. *Karamdeo v. State of Bihar*, A. 1956 Pat. 228 (232).

25. *Attndra v. Gillot*, (1955) 59 C.W.N. 835 (842, 844).

1. *Chandra Bhan v. Union*, A. 1956 Bom. 601.

2. *State of Andhra v. Kameshwara*, A. 1957 Andhra 794 (805).

3. *Bhagelu v. Civil Surgeon*, A. 1960 All. 353 (356).

4. Corresponding Rules have been made with respect to the Indian Police Service.

5. *Suresh v. Himangshu*, A. 1953 Cal. 316.

6. *Jatindra v. Gupta*, (1953) 58 C.W.N. 128 (133).

the Provincial Government to the Governor 'acting in his individual judgment' is void inasmuch as under the Constitution, the Governor cannot exercise any such function in his individual judgment.'

2. The existing Rules relating to the subordinate Judiciary must be read subject to the provisions in Arts 233-7.<sup>9</sup>

**314.** Except as otherwise expressly provided by this Constitution, every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

**'As changed circumstances may permit'.**

The Patna High Court<sup>7</sup> has held that the words 'changed circumstances . . . ' qualify the latter part of the guarantee offered by the Article, viz., 'rights as respects disciplinary matters or right as similar thereto' and not the first part, viz., 'conditions of service as respects remuneration, leave and pension'. Hence, the consideration of changed circumstances cannot affect the guarantee with respect to conditions of service, including remuneration etc. which applied to members of the I.C.S. at the commencement of the Constitution.

It follows from the above that the rights to overseas pay and passage cannot be denied to these members even though the circumstances have changed after Independence and the Rules 1 (2) and 3 of the All India Services (Overseas Pay, Passage and Leave Salary) Rules, in so far as they deny this right, are unconstitutional.<sup>8</sup>

**'Remuneration'.**

This word has the same meaning as in s. 19 (4) of the Indian Independence Act, 1947, so as to include 'leave, pay, allowances and the cost of any privileges or facilities provided in kind'.<sup>9</sup>

**'Same rights as respects disciplinary matters.'**

1. Persons appointed by the Secretary of State who are members of an All-India Service hold office during the pleasure of the President [Art. 310 (1)].

2. But when such person is serving in connection with the affairs of a State, there is nothing in the Constitution to debar the State Government from exercising its statutory power under s. 2 of the Public Servants (Inquiries) Act, 1850, to direct an inquiry against him.<sup>10,11</sup> Nor is there anything to prevent the President from exercising his power of dismissal on the report of the Enquiry Commissioner appointed by the State Government.<sup>11</sup> Where there has been a regular

7. *State of Andhra v. Kameshwara*, A. 1957 Andhra 794 (806).

8. *Devasahayam v. State of Madras*, A. 1958 Mad. 53 (56).

9. *Bakshi v. Accountant-General*, A. 1957 Pat. 515 (523).

10-11. *Kapur Singh v. Union of India*, A. 1960 S.C. 493 (497).



hearing at the inquiry stage, Art. 311 (2) does not require the President to give such person an oral hearing before issuing a notice to show cause why the proposed action should not be taken against him.<sup>1</sup>

3. By reason of the words 'same rights', before a disciplinary action may be taken against a member of the Indian Civil Service, he is entitled to an inquiry into his alleged misdemeanour either under the Public Servants (Inquiries) Act, 1850 or under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution.<sup>1</sup>

## CHAPTER II—PUBLIC SERVICE COMMISSIONS

**315.** (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public

Public Service Com-  
missions for the  
Union and for the  
States.

Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor . . . of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

**316.** (1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor . . . of the State;

Appointment and  
term of office of  
members.

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission the age of sixty years, whichever is earlier :

Provided that—

(a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor . . . of the State, resign his office ;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

**317.** (1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor . . . , in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be,—

(a) is adjudged an insolvent ; or

(b) engages during his term of office in any paid employment outside the duties of his office ; or

(c) is in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or



interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

**318.** In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor . . . of the State may by regulations—

Power to make regulations as to conditions of service of members and staff of the Commission.

(a) determine the number of members of the Commission and their conditions of service ; and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service :

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

**319.** On ceasing to hold office—

Prohibition as to the holding of offices by members of Commission on ceasing to be such members.

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State ;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State ;

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission, or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State ;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment

either under the Government of India or under the Government of a State.

**320.** (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

Functions of Public Service Commissions.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

- (a) on all matters relating to methods of recruitment to civil services and for civil posts ;
- (b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers ;
- (c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters ;
- (d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State ;
- (e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other



matter which the President, or, as the case may be, the Governor . . . <sup>12</sup> of the State, may refer to them :

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, . . . <sup>12</sup> as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions or article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor . . . <sup>12</sup> of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

#### Art. 320: Functions of the Public Service Commission.

Arts. 320-321 lay down the functions of a Public Service Commission and it cannot assume any function which is not authorised by either of these two Articles.<sup>13</sup>

#### Cl. (1). 'Examinations'.

Nothing is said in the clause as to whether the examinations are to be selective or competitive in nature nor does the clause *per se* confer any right upon the candidate or candidates who stand highest in order of merit, at such examination.<sup>14</sup>

'Services of the State'. —This expression includes the staff of the High Court whose salaries etc. are charged upon the Consolidated Fund of State under Art. 229 (3). But, as the Proviso to Art. 229 (1) expressly provides, in the exercise of his power of appointment to these posts, after the Constitution, the Chief Justice shall be required to consult the State Public Service Commission only if the Governor makes a rule specifying the cases in which such consultation shall be necessary.<sup>15</sup> Subject to this, the Chief Justice is under no obligation to consult the Public Service Commission in making appointments to the staff of the High Court.

12. References to the Rajpramukh have been omitted by the Constitution (Seventh Amendment) Act, 1956.

13. *Mira Chatterjee v. Public Service Commn.*, A. 1958 Cal. 345 (349).

14. *Kesava v. State of Mysore*, A. 1946 Mys. 21 (22).

15. *Pradyat v. Chief Justice*, A. 1956 S.C. 285.

**Cl. (3): Not mandatory.**

It is now settled by the Supreme Court<sup>16</sup> that the words 'shall be consulted' are not to be construed in the sense that in default of consultation the action of Government under any of the sub-clauses of this clause would be null and void.

**'Civil services and posts'.**

This expression in cls. (a) and (b) of Art. 320 has the same meaning as in Arts. 310 (1) and 311 (1). It means services and posts other than military.<sup>17</sup>

This expression is wide enough to include any kind of disciplinary action proposed to be taken against an officer,<sup>18</sup> such as dismissal, removal, reduction in rank.

But if it is not a disciplinary measure (e.g., fixing the age of retirement of certain officers),<sup>19</sup> or the action taken does not amount to dismissal, removal or reduction in rank,<sup>20</sup> Art. 320 (3) (c) is not attracted.

**'Person serving under the Government of India or the Government of a State'.**

This expression does not include officers and members of the staff attached to the High Court even though they are included in the expression 'persons appointed to public services and posts in connection with the affairs of the Union or of a State' used in Art. 309.

The expression 'serving under . . . ' refers to persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or of the Governor. The officers and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is vested in the Chief Justice who has the power of appointment and removal and of making rules for the conditions of service.<sup>21</sup>

**'Memorials or petitions'.**

An application for review<sup>22</sup> or an appeal<sup>23</sup> would be covered by this expression.

**When the Commission is to be consulted.**

1. The sub-clause requires the Commission to be consulted before the person is 'affected'. So, normally the consultation should take place after the Government servant has shown cause against the action proposed and before the penalty is awarded,<sup>24</sup> i.e., when Government is satisfied that disciplinary action is necessary.<sup>25</sup> The delinquent officer cannot claim that the notice can be issued only after the Commission has been consulted.<sup>26</sup>

2. Where the Commission was consulted before issuing notice upon the Petitioner to show cause against the action proposed but the Petitioner elected not to show cause, it was not necessary to consult the Commission again before awarding the punishment proposed.<sup>27</sup>

16. *State of U. P. v. Srivastava*, (1957) S.C.A. 1022 : A. 1957 S.C. 912.

17. *Amar Singh v. State of Rajasthan*, A. 1956 Raj. 104 (106).

18. *Pradyal v. Chief Justice*, (1956) S.C.A. 79 (92).

19. *Vichory v. State of M. P.*, A. 1952 Nag. 288.

20. *Cf. State of Punjab v. Sukhbans*, A. 1957 Punj. 191.

21. *Pantulu v. Govt. of Andhra*, A. 1953 A.P. 240 (251).

22. *Cf. Union of India v. Varma*, A. 1957 S.C. 882.

23. *Sundaram v. State*, A. 1956 T.C. 158 (159).

24. *Varadarajulu v. State of Madras*, A. 1960 Mad. 393.

25. *John v. State of T. C.*, (1955) 1 S.C.R. 1011.



3. The word 'petitions' in the clause does not include review petitions presented after the disciplinary proceedings have been terminated after due consultation with the Commission.<sup>25a</sup>

#### Effect of non-consultation.

This clause, and sub-cl. (3) in particular, has lost much of its importance since the decision of the Supreme Court<sup>1</sup> that while Art. 311 confers a right upon the Government servant, Art. 320 (3) (c) does not confer any such right. The consultation prescribed by the sub-clause is only to afford proper assistance to the Government in assessing the guilt or otherwise of the delinquent officer as well as the suitability of the penalty to be imposed. But, for the omission of irregularity in such consultation, the aggrieved officer has no remedy in a Court of law nor any relief under the extraordinary powers conferred by Arts. 32 and 226 of the Constitution.

**Cl. (d)-(e).**—These sub-clauses also use the expression 'serving under the Government'. Hence, the staff of a High Court are clearly excluded from the scope of these sub-clauses.<sup>2</sup>

#### Claim for re-imbursement of costs of defence.

When a civil servant is acquitted in a legal proceeding coming under sub-cl. (d), the Department should not, without consulting the Public Service Commission, reject the claim for reimbursement of costs on the ground that it is not admissible under the Rules.<sup>3</sup>

**'To advise'.**—Being an advisory or consultative body, the Commission is entitled to withhold any information from the Government.<sup>4</sup>

#### Proviso to Art. 320 (3).

1. This Proviso enables the President and Governor to make regulations to take out particular classes from the obligation to consult the Public Service Commission under Art. 320 (3). Such regulations may—

(i) Either provide that with respect to the specified matters, such consultation will not be necessary; or,

(ii) Provide that such consultation shall not be necessary in respect of particular classes or cases; or,

(iii) Provide that such consultation shall not be necessary in particular circumstances.

2. But the power can be exercised only by making 'regulations' in conformity with the above conditions and not by executive orders in relation to particular cases. Thus, Rule 7 of the Railway Services (Safeguarding of National Security) Rules, 1954 provides that consultation with the Public Service Commission is not necessary for termination of service under those Rules.<sup>5</sup> Similarly, there is no need for consultation where under the Regulations made by the Governor under this Proviso, the Commission is not required to be consulted when disciplinary action is taken by any authority other than the Government,<sup>6</sup> or when

25a. *John v. State of T. C.*, (1955) 1 S.C.R. 1011.

1. *State of U. P. v. Srivastava*, A. 1957 S.C. 912.

2. *Cf. Pradyat v. Chief Justice*, A. 1956 S.C. 285.

3. *Cf. Samsul v. Union of India*, A. 1957 Assam 143.

4. *Kesava v. State of Mysore*, A. 1956 Mys. 21 (26).

5. *Ananthanarayanan v. S. Ry.*, A. 1956 Mad. 220.

6. *Bhanuprasad v. State*, A. 1956 Sau. 14 (19); *Mahadev v. Chatterjee*, A. 1954 Pat. 285.

a Government servant is suspended pending inquiry,' or where orders are passed on the advice of the Tribunal for Disciplinary Proceedings.'

3. Though Art. 320 (3) (c) is directory and though the Proviso empowers the Government to make Regulations for excluding such consultation, it does not mean that Government has no constitutional obligation to consult the Commission<sup>7</sup> or that it is at the pleasure of the Government in any particular case to consult or not to consult the Commission. It only means that if in any case Government fails to consult, the decision of Government to terminate the services of the employee shall not be invalidated by a court of law. Once the Government makes Regulations under the Proviso, it cannot make *ad hoc* exemptions outside those Regulations.

This does not, however, prevent the Government from making a retrospective Regulation giving validity to an appointment already made, provided the Regulation is made *before the appointment takes effect*.<sup>8</sup>

4. By reason of Art. 313, Regulations made under the corresponding provision of the Government of India Act, 1935 [s. 266 (3)] shall continue to be in force until new Regulations are made under the Proviso to Art. 320 (3).<sup>9</sup>

#### Cl. (4).

This clause makes it clear that the Commission has no right to be consulted in the matter of reservation of posts for backward classes nor can it itself make any such reservation.<sup>10</sup>

#### Cl. (5): 'Shall be laid before Parliament'.

1. The requirement as to laying before Parliament is directory notwithstanding the word 'shall', for no consequence for non-compliance with the requirement is laid down in the Article. Hence, the Rules made under the Proviso to cl. (3) are not rendered invalid if they are not laid before Parliament as required by cl. (5).<sup>11-14</sup> Though the Rules are subject to any modifications as the Legislature may make, it is not a condition precedent to their validity that they should be formally approved by the Legislature.<sup>15</sup>

2. By reason of Art. 372 (1), Regulations made under Art. 266 (3) of the Government of India Act, 1935, continue to be in force until replaced by Regulations made under the Proviso to Art. 320 (3).<sup>16</sup> It is not necessary to lay these Regulations before Parliament under Art. 320 (5) even though they are adapted after the commencement of the Constitution.<sup>17</sup>

**321.** An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commissions.

Power to extend functions of Public Service Commissions. Commission as respects the services of the

7. *Thimma Reddy v. State of Andhra*, A. 1958 A.P. 35 (37).

8. *Pantulu v. Govt. of Andhra*, A. 1958 A.P. 240 (251).

9. *Durga Singh v. State of Punjab*, A. 1957 Punj. 97.

10. *Sivaramakrishnan v. Arumugha*, A. 1957 Mad. 17.

11. *Prahlad v. Tikaitri*, A. 1956 Pat. 233.

12. *Kesava v. State of Mysore*, A. 1956 Mys. 20 (25).

13. *Munna Lal v. Scott*, A. 1955 Cal. 451.

14. *Dalmer Singh v. State of Pepsu*, A. 1955 Pepsu 97.

15. *Vishveswar v. S. T. A.*, A. 1955 Nag. 163.



Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

**Art. 321: Power to confer additional functions on a Public Service Commission.**

1. A Public Service Commission cannot take up any function other than those specified in Art. 320, even at the request of the Government, unless such functions are conferred in the manner prescribed by Art. 321.<sup>16</sup>

2. The conditions for the conferment of additional functions under the present Article are—(a) an Act of the competent Legislature; (b) such functions must relate to the services of the Union, or the State, or a local authority, or a statutory corporation, or a public institution. It cannot be done by any private arrangement between the Government and the Commission.<sup>16</sup>

**322.** The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

**323.** (1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor . . .<sup>17</sup> of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor . . .<sup>17</sup> of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor, . . .<sup>17</sup> shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

16. *Mira Chatterjee v. Public Service Commn.*, A. 1958 Cal. 345 (349).

17. References to the 'Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

## PART XV

## ELECTIONS

**324.** (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine :

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment :

1. In clause (1) of article 324, the reference to the Constitution shall, in relation to elections to either House of the Legislature of Jammu and Kashmir, be construed as a reference to the Constitution of Jammu and Kashmir.



Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President or the Governor . . . of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

#### Scope of jurisdiction of Election Commission.

The words 'superintendence, direction and control' empower the Election Commission to act in contingencies not provided for by law, and to pass necessary orders for the conduct of the election, e.g., a repoll should be held or not at a particular polling station.<sup>2</sup>

#### Jurisdiction of High Courts over the Election Commission.

The Election Commission is a 'tribunal' within the jurisdiction of the High Court under Arts. 226-7. But since this jurisdiction may be exercised by a High Court only in respect of tribunals situated 'within the territory in relation to which it exercises its jurisdiction', no High Court in India, other than the High Court of Punjab has local jurisdiction over the Election Commission located in Delhi. The conclusion may be 'inconvenient', but the language of the Articles is reasonably plain.<sup>3</sup>

**325.** There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

**326.** The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal

Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

2. *Moti Lal v. Mangla*, A. 1958 All. 794 (799).

3. *Election Commission v. Saka Venkata*, (1953) S.C.R. 1144.

4. Articles 325, 326, 327 and 328 shall not apply to the State of Jammu and Kashmir.

5. Not applicable to the State of Jammu and Kashmir.

practice, shall be entitled to be registered as a voter at any such election.

### Scope of Art. 326.

1. This article does not confer any justiciable right to elect. If any person is deprived of the right to vote by reason of the omission of his name from the electoral roll, his remedy would be to follow the procedure prescribed by the electoral law made under art. 327, for rectifying such omission.<sup>6</sup>

2. For the same reason, when the nomination of a candidate has been rejected by the Returning Officer, an elector cannot apply under Art. 226 against the decision of the Returning Officer on the ground that his right to elect has thereby been denied. Such decision cannot be challenged by anybody except as provided in Art. 329 (b).<sup>4</sup>

**327.** Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

**328.** Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

**329.** Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court ;

6. *Polak v. Patnaik*, A. 1954 Orissa 87.

7. Not applicable to the State of Jammu and Kashmir.

8. Art. 329 has been extended to Jammu and Kashmir by the Constitution (Application to J. & K.) Amendment Order, 1960, with this modification—

"In article 329, clause (a) shall be omitted, and in clause (b), the reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir".



- (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

**Scope of Art. 329: Bar to interference by Courts in electoral matters.**

Cl. (b) is to be read as complementary to cl. (a). While cl. (a) ousts the jurisdiction of the Courts with regard to such law as may be made under Arts. 327-8 (e.g., the Representation of the People Act), relating to the delimitation of constituencies or the allotment of seats of such constituencies, cl. (b) ousts the jurisdiction of the Courts with regard to the matters arising between the commencement of the polling and the final election.<sup>9</sup>

#### Arts. 71 (1) and 329 (b).

There is an important difference between these two provisions. While Art. 71 (1) had to be in an affirmative form because it confers special jurisdiction on the Supreme Court which that Court could not have exercised but for this Article, cl. (b) of Art. 329 was primarily intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged.<sup>9</sup>

#### Cl. (b): Bar to jurisdiction of Courts in election matters.

1. This clause excludes the jurisdiction of the Courts to entertain any matter relating to 'election' which can be questioned only by an election petition under the law prescribed by the appropriate Legislature (cf. Chs. II-III of the Representation of the People Act, 1951). Hence, a suit for setting aside an election would not lie.<sup>10</sup>

'Election' in this context means the *entire* process culminating in a candidate being declared elected.<sup>11</sup>

By reason of this clause, the following matters cannot, therefore, be challenged by a suit; the only remedy would be an election petition:

(i) Acceptance or rejection of a nomination paper by a Returning Officer.<sup>12</sup>

(ii) Any matter which arises while the elections are in progress,<sup>13</sup> i.e., at every stage from the time of the issue of the notification appointing a date for nomination<sup>14</sup> till the result is declared.<sup>15</sup>

2. But the word 'election' does not include the *decision* of an Election Tribunal as to the *validity* of the election.<sup>16</sup> The 'election' referred to in Art. 329 (b) ends before the setting up of an Election Tribunal.<sup>17</sup> The proceedings before the Election Tribunal are not, accordingly, excluded from the jurisdiction of the High Court<sup>18</sup> or Supreme Court.<sup>19</sup>

9. *Ponnuswami v. Returning Officer*, (1952) S.C.R. 218.

10. *Hari Vishnu v. Ahmad*, A. 1955 S.C. 233; (1955) 1 S.C.R. 380.

11. *In re Mathai*, A. 1952 T.C. 1; *Shankar v. State of Bihar*, A. 1953 Pat. 47; *Polak v. Patnaik*, A. 1954 Orissa 87.

12. *Tirath Singh v. Bachilar*, A. 1954 Pepsu 118.

13. *Shankar v. State of Bihar*, A. 1953 Pat. 47.

14. *Shankar v. Returning Officer*, A. 1952 Bom. 277.

15. *Rajkrishna v. Binod*, (1954) S.C.R. 913; (1952-4) 2 C.C. 618.

16. *Nagappa v. Basappa*, A. 1954 Mys. 102.

**Power to interfere with decisions of Election Tribunals.**

1. Though Art. 329 takes away the jurisdiction of Courts to interfere with any order of any Election authority relating to the election proceedings, it does not preclude the High Court or the Supreme Court to interfere with the *decisions* of Election Tribunals in exercise of the powers of control conferred by the Constitution upon the High Court and the Supreme Court over all 'tribunals', by Arts. 136,<sup>17</sup> 226<sup>18</sup> or 227.<sup>19</sup>

2. As to the grounds upon which the High Court or the Supreme Court may interfere with the decision of an Election Tribunal, see pp. 296, 422, 440, *ante*.

## PART XVI

**SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES**

**330.** (1) Seats shall be reserved in the House of the People for—

- |  |  |
|--|--|
| Reservation of<br>seats for Scheduled<br>Castes and Schedul-<br>ed Tribes in the<br>House of the People. | (a) the Scheduled Castes ;<br>(b) the Scheduled Tribes except the Sched-<br>uled Tribes in the tribal areas of<br>Assam ; and<br>(c) the Scheduled Tribes in the auto-<br>nomous districts of Assam. |
|--|--|

(2) The number of seats reserved in any State or Union territory<sup>2</sup> for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory<sup>2</sup> in the House of the People as the population of the Scheduled Castes in the State or Union territory<sup>2</sup> or of the Scheduled Tribes in the State or Union territory<sup>2</sup> or part of the State or Union territory<sup>2</sup>, as the case may be, in respect of which seats are so reserved bears to the total population of the State or Union territory<sup>2</sup>.

**Effect of reservation.**

1. The effect of reservation of seats for the Scheduled Castes (or Scheduled Tribes, as the case may be) is to guarantee a minimum number of seats to the members of the Scheduled Castes. It does not deprive a member of a Scheduled Caste of his right to contest a general seat which every adult citizen (not otherwise disqualified)

17. *Durgashankar v. Raghubar*, (1955) 1 S.C.R. 267, (1952-4) 2 C.C. 619.

18. *Rafkrishna v. Binod*, (1954) S.C.R. 913.

19. *Hari Vishnu v. Ahmad*, (1955) 1 S.C.R. 1104 (1120).

1. In its application to the State of Jammu and Kashmir, in article 330, references to the "Scheduled Tribes" shall be omitted.

2. Inserted by the Constitution (Seventh Amendment) Act, 1956.



possesses, and he can contest for a general seat on the strength of the very nomination for a reserved seat.<sup>3</sup>

2. If, in a two-member constituency, one seat is reserved for the Scheduled Castes, and, besides the member returned to this reserved seat, another member of the Scheduled Castes secures the highest votes at the general election, there is nothing to prevent the second member of the Scheduled Castes from being elected to the second seat.<sup>4</sup>

<sup>3</sup>331. Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

<sup>4</sup>332. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State. . . .

Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside the district except in the case of the constituency comprising the cantonment and municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and municipality of Shillong.

3. *Digambar Rao v. Deorao*, (1958) 60 Bom. L.R. 1065.

4. *Giri v. Dora*, A. 1959 S.C. 1318.

5. Articles 331 and 332 shall not apply to the State of Jammu and Kashmir.

**\*333.** Notwithstanding anything in article 170, the Governor . . . of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate such number of members of the community to the Assembly as he considers appropriate.

Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

**\*334.** Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to—

Reservation of seats and special representation to cease after ten years.

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the

Legislative Assemblies of the States; and

(b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination,

shall cease to have effect on the expiration of a period of twenty years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

**\*335.** The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Claims of Scheduled Castes and Scheduled Tribes in services and posts.

**\*336.** (1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

Special provision for Anglo-Indian community in certain services.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per

6. Not applicable to the State of Jammu and Kashmir.

7. The words 'ten years' have been substituted by the words 'twenty years' by the Constitution (Eight Amendment) Act, 1959.



cent. than the numbers so reserved during the immediately preceding period of two years :

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.<sup>8</sup>

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

<sup>8</sup>**337.** During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State . . . for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years :

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease :

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

#### Scope of Art. 337.

The benefit conferred by this Article extends only to educational institutions established prior to 31-3-48. Any institution established thereafter has no constitutional right to receive grant from the State.<sup>9</sup>

#### Proviso 2 to Art. 337.

The condition imposed by this Proviso for receiving a grant under the Article is in conformity with the provisions of Art. 29 (2) [see p. 158, *ante*]. This is the only condition which is imposed by the Constitution upon the right of the Anglo-Indian institutions to receive State aid, therefore, if additional conditions precedent were imposed by the State on the right to receive such grant, such conditions would

8. Since Arts. 336-337 have *not* been amended by the Constitution (Eight Amendment) Act, 1959, the reservations in favour of the Anglo-Indians have ceased to operate at the end of January 25, 1960.

9. Not applicable to the State of Jammu and Kashmir.

10. Ref. on the Kerala Education Bill, A. 1958 S.C. 956 (1979).

infringe the rights of the Anglo-Indian community not only under Art. 337 but also under Art. 30 (1).<sup>10</sup>

**338.** (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

Special Officer for  
Scheduled Castes,  
Scheduled Tribes,  
etc.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

**339.** (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. . . .

Control of the  
Union over the ad-  
ministration of Sched-  
uled Areas and the  
welfare of Scheduled  
Tribes.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provision as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

**340.** (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose

Appointment of a  
Commission to inves-  
tigate the conditions  
of backward classes.

11. Not applicable to the State of Jammu and Kashmir.



by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

**341.** (1) The President *may with respect to any State or Union territory*<sup>12</sup>, and where it is a State . . . after consultation with the Governor . . . thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.<sup>12</sup>

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe, or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

#### Scheduled Castes.

1. The list of Scheduled Castes is now contained in the Constitution (Scheduled Castes) Order, 1950,<sup>13</sup> as amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act (LXIII of 1956).

2. A person who belongs to a caste or tribe included in the Order made under Art. 341 or 342 (as the case may be) does not cease to be so merely by performing ceremonies appertaining to the higher castes,<sup>14</sup> or by becoming a member of the Arya Samaj.<sup>15</sup>

**1342.** (1) The President *may with respect to any State or Union territory*,<sup>17</sup> and where it is a State . . . after consultation with the Governor . . . thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution

12. Added by the Constitution (Seventh Amendment) Act, 1956.

13. Validity upheld in *Michael v. Venkatswaram*, A. 1952 Mad.

474.

14. *Dippala v. Giri*, A. 1958 A.P. 724 (735).

15. *Shyamsunder v. Shankar*, A. 1950 Mys. 27.

16. Not applicable to the State of Jammu and Kashmir.

17. Inserted by the Constitution (Seventh Amendment) Act, 1956.

be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

#### Scheduled Tribes.

The list of Scheduled Tribes is now contained in the Constitution (Scheduled Tribes) Order, 1950, as amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act (LXIII of 1956).

### PART XVII

## OFFICIAL LANGUAGE

### CHAPTER I.—LANGUAGE OF THE UNION

**343.** (1) The official language of the Union shall be Hindi in Devanagari script.

Official language of the Union. The form of numerals to be used for official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

- (a) the English language, or
- (b) the Devanagari form of numerals,

for such purposes as may be specified in the law.

1. The provisions of this Part shall apply to the State of Jammu and Kashmir only in so far as they relate to—

- (i) the official language of the Union;
- (ii) the official language for communication between one State and another, or between a State and the Union; and
- (iii) the language of the proceedings in the Supreme Court.



**344.** (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

- (a) the progressive use of the Hindi language for the official purposes of the Union ;
- (b) restrictions on the use of the English language for all or any of the official purposes of the Union ;
- (c) the language to be used for all or any of the purposes mentioned in article 348 ;
- (d) the form of numerals to be used for any one or more specified purposes of the Union ;
- (e) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

## CHAPTER II.—REGIONAL LANGUAGES

**345.** Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more

Official language or of the languages in use in the State or languages of a State. Hindi as the language or languages to be used for all or any of the official purposes of that State :

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

**Scope of Art. 345.**

1. The Article merely empowers the Legislature of a State to adopt Hindi or any State language as the official language of that State. But it does not lay down that after such adoption, English will cease to be an official language or proceedings done in English will be invalid.<sup>2</sup>

2. In order to bar the use of English for official purposes, the State Legislature must enact an express legislation for that purpose as envisaged by the Proviso.<sup>2</sup> The M. B. Official Language Act, 1950, is not such a law.<sup>2</sup> Hence, even after the passing of this Act, English continued to be the language of the subordinate Courts under s. 137 (3) of the C. P. Code.<sup>2</sup>

**346.** The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union :

Official language for communication between one State and another or between a State and the Union.

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

**347.** On a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

Special provision relating to language spoken by a section of the population of a State.

2. *Dayabhai v. Natwarlal*, A. 1957 M.P. 1.



CHAPTER III.—LANGUAGE OF THE SUPREME COURT,  
HIGH COURTS, ETC.

**348.** (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts—

- (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,
- (ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor . . .<sup>3</sup> of a State, and

- (iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor . . .<sup>3</sup> of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State :

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor . . .<sup>3</sup> of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor . . .<sup>3</sup> of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

**CL. (3): Authoritative text.**

1. The effects of this clause are not quite clear. It makes an exception to the provision in cl. (1) (b), in favour of a State Legislature. The two provisions, read together, indicate that a State Legislature may prescribe the use of any language other than English for Bills and Acts passed by itself, or subordinate legislation made there-

3. The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

under, but then, it is an English translation of the Bill or Act, duly published under cl. (3), which shall be deemed to be the 'authoritative text' of the same. It follows, therefore, that in case of conflict between the State language and the English translation, the latter shall prevail.<sup>4</sup> Of course, if there is any ambiguity in the English text, the Hindi version may be referred to as an external aid.<sup>5</sup>

2. The question is, what happens if no English translation is made and published in respect of any Act or rule. The Madhya Bharat High Court<sup>6</sup> has held that the publication under Art. 348 (3) is not a condition precedent to the validity of the Act or rule; hence, the Act or rule made in the State language will have full effect. The only consequence of the absence of an English translation will be that there will be no authoritative text.

3. In order to be an 'authoritative text', the English translation must be published 'under the authority of the Government'.<sup>7</sup>

**349.** During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making

Special procedure for enactment of certain laws relating to language.

provision for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

#### CHAPTER IV.—SPECIAL DIRECTIVES

**350.** Every person shall be entitled to submit a representation for the redress of any grievance

Language to be used in representations for redress of grievances.

to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

**350A.** *"It shall be the endeavour of every State and of every local authority within the State to provide adequate*

Facilities for instruction in mother-tongue at primary stage.

*facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.*

4. *Saghir Ahmad v. State of U. P.*, A. 1954 All. 257 (278).

5. *Govindram v. Assessing Authority*, A. 1958 M.P. 16 (19).

6. *Raichand v. Saichalak*, A. 1957 M.B. 26 (29); *Haji v. S. T. O.*, A. 1959 All. 208.

7. *Ashgar Ali v. State of U. P.*, A. 1959 All. 792.

8. Inserted by the Constitution (Seventh Amendment) Act, 1956.



**'Linguistic minority'.**

This expression refers to a linguistic group which is in a numerical minority in the State as a whole as distinguished from any particular area or region therein.<sup>9</sup>

**350B.** <sup>1</sup>(1) *There shall be a Special Officer for linguistic minorities to be appointed by the President.*

(2) *It shall be the duty of the Special Officer for linguistic minorities, to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.*

**Objects of Art. 350A-B.** —These Articles have been inserted by the Constitution (Seventh Amendment) Act, 1956, with the object of safeguarding the interests of the linguistic minorities which have particularly come into existence as a result of the reorganisation of the States.

**351.** *It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.*

Directive for development of the Hindi language.

## PART XVIII

**EMERGENCY PROVISIONS**

**1352.** (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

9. Ref. on the Kerala Education Bill, A. 1958 S.C. 956.  
1. In its application to the State of Jammu and Kashmir, the following new clause shall be added to article 352 :—  
“(4) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects article 354) unless it is made at the request or with the concurrence of the Government of that State.”

(2) A Proclamation issued under clause (1)—

- (a) may be revoked by a subsequent Proclamation ;
- (b) shall be laid before each House of Parliament ;
- (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

**353.** While a Proclamation of Emergency is in operation, then—

Effect of Proclamation of Emergency.	(a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised ;
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(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

**354.** (1) The President may, while a Proclamation of



Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

**355.** It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

**356.** (1) If the President, on receipt of a report from the Governor . . . of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

Duty of the Union to protect States against external aggression and internal disturbance.

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor . . . , or any body or authority in the State other than the Legislature of the State ;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament ;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State :

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3) :

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years :

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.



**357.** (1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

Exercise of legislative powers under Proclamation issued under article 356.

- (a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf ;
- (b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof ;
- (c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under article 356, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

**358.** While a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Suspension of provisions of article 19 during emergencies.

**359.** (1) Where a Proclamation of Emergency is in operation, the President may by order

Suspension of the enforcement of the rights conferred by Part III during emergencies.

declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

**360.** (1) If the President is satisfied that a situation has arisen whereby the financial stability or

Provisions as to financial emergency.

credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

(2) The provisions of clause (2) of article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued under article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State ;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State ;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

4. Article 360 shall not apply to the State of Jammu and Kashmir.



## PART XIX

## MISCELLANEOUS

**361.** (1) The President, or the Governor . . . of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Protection of President and Governors.

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor . . . of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor . . . of a State shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor . . . of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor . . . of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor . . . as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

**Art. 361: Personal Immunity of President or Governor . . . for official acts.**

This Article gives personal immunity from legal action to the heads of the States for their official acts.

1. In its application to the State of Jammu and Kashmir, to article 361, after clause (4), the following clause shall be added:—

"(5) The provisions of this article shall apply in relation to the *Sadar-i-Riyasat* of Jammu and Kashmir as they apply in relation to a Governor, but without prejudice to the provisions of the Constitution of that State."

2. The words 'or Rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956. [As a result, the ex-Rajpramukhs have lost their immunity from criminal proceedings under the present clause: *Keskar v. Nizam*, (1960) S.C. (Cr. A. 103/55).]

**'Shall not be answerable to any court'.**

This clause means that no Court can compel the President or Governor to exercise any power or to perform any duty nor can a Court compel him to forbear from exercising his power or performing his duties. He is not amenable to the writs or directions issued by any Court.<sup>3</sup>

**'Acts done or purporting to be done'.**

The protection offered by the Article extends not only to the official acts and omissions but also to acts and omissions which can be said to be incidental to the exercise of the powers or performance of the duties of the Governor.<sup>4</sup>

The words 'purporting to be done' are of a very wide implication and even though the act done is outside or in contravention of the Constitution, it comes within the protection of Art. 361, if the act is *professed to be done* in pursuance of the Constitution.<sup>5</sup> If the act is *ostensibly* done in the exercise of the power given under the Constitution and it is not established that the act was done *dishonestly* or in *bad faith*, i.e., out of any improper motive, the immunity attaches to the exercise of the power.<sup>6</sup> Thus, Art. 361 stands as an absolute bar to relief where the Governor made an *erroneous* decision or a *wrong* choice, in the matter of making nominations in exercise of the power conferred by Art. 171 (3).<sup>7</sup>

**2nd Proviso.**

1. Because the executive head is not personally amenable to the process of the Court, it cannot be said that his acts purporting to be done in pursuance of the Constitution are beyond the scrutiny of the Courts.<sup>8</sup> In cases in which action lies against the Government (see pp. 535-7, *ante*), the action of the President or the Governor, as the case may be, may be scrutinised by the Courts in order to give relief to the individual against the Government.

2. The Proviso makes it clear that the personal immunity of the head of the State does not bar any suit being brought or any writ being issued against the Government, where the suit or proceeding would have been otherwise maintainable against the Government. To such a suit or proceeding, the Governor is not a necessary party.<sup>9</sup>

**Cl. (4): Acts done in personal capacity.**

While cl. (1) deals with acts done by the Governor etc. in their official capacity, cl. (4) deals with acts done by them in their *personal* capacity. While in respect of acts done or purported to be done in official capacity an *absolute* bar is created, in respect of personal acts only a partial bar in the shape of notice for a period of two months prior to the institution of civil proceedings is imposed, similar in nature to that to be found in s. 80 of the Code of Civil Procedure.<sup>10</sup>

**\*362.** In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given

Rights and privileges of Rulers of Indian States.

3. *Bimanchandra v. Dr. H. C. Mukherjee*, (1952) 56 C.W.N. 651 (654).

4. *Karkare v. Shevde*, A. 1952 Nag. 330; *Lakman v. Rajpramukh*, A. 1953 M.B. 54.

5. *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383 (386).

6. Article 362 shall not apply to the State of Jammu and Kashmir



under any such covenant or agreement as is referred to in . . . , article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

**Art. 362: Guarantee of rights and privileges of Rulers of Indian States.**

1. This Article gives constitutional recognition to those personal rights, privileges and dignities, of the Rules of Indian States [Art. 366 (22), *post*] which have been assured by covenant or agreement between the Government of India and such Rulers prior to the Constitution, e.g., as to title use of red plate in cars, suits and prosecutions.

2. S. 86 of the Code of Civil Procedure provided that a Ruling Chief could not be sued without the consent of the Central Government. In view of Art. 362 this privilege is available even after the commencement of the Constitution. This has now been safeguarded by s. 87B,\* inserted by the C. P. C. Amendment Act, 1951. Similarly, s. 197A has been inserted in the Cr. P. C. to ensure that no prosecution shall lie against an ex-Ruler except with the previous sanction of the Central Government. The privilege under s. 197A, Cr. P. C. is, however, confined to prosecution for an 'offence' and does not extend to an application under s. 488, Cr. P. C.<sup>11</sup>

3. The Rulers' status under the Constitution is that of mere citizens of India, but for certain privileges etc., which shall not be possessed by any other citizen. To this extent, Art. 362 forms an exception to Arts. like 15 and 18.

**'Agreement as is referred to in Art. 291'.**

These words to the agreements mentioned in the opening words of Art. 291, that is, any 'covenant or agreement entered into.....before the commencement of the Constitution' by which personal rights or privileges were guaranteed to the Rulers.<sup>12,13</sup>

**'Personal rights, privileges and dignities'.**

1. What is saved by Art. 362, however, is the 'personal' rights and privileges of the ex-Rulers and not their constitutional or political rights, such as the power to grant suspension or remission of death sentences.<sup>12</sup>

2. The guarantee given by the Article is of limited extent: It only guarantees that the Ruler's private properties will not be claimed as State properties.<sup>14</sup> The guarantee has no greater scope than this and does not, accordingly, prevent the State from dealing with the property on the assumption that it is private property,<sup>14</sup> and to acquire<sup>14</sup> or regulate such property along with other private properties, under a tenancy legislation or the like.<sup>15</sup>

7. The words "clause (1) of" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

8. Validity of this section was upheld in *Bhimaji v. Ramrao*, (1955) 57 Bom. L.R. 60 (63).

9. *Jaswantisinghji v. State of Bombay*, A. 1955 Bom. 108.

10. *Cf. Das J. in Vishveswar v. State of M. P.*, (1952) S.C.R. 1020

11. *Bhimaji v. Ramrao*, (1955) 57 Bom. L.R. 60 (63).

12. The scope of Art. 362 is not confined to agreements relating to Privy Purse as was supposed by *Pravir v. State of M. P.*, (1952) 7 D.L.R. 17 (Nag).

13. *Vareed v. State of T. C.*, (1956) S.C.A. 448 (494).

14. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (941).

15. *Jagannath v. Harihar*, (1958) S.C.R. 1067.

3. It follows that Art. 362 does not bar the acquisition of the properties which were recognised as the 'private property' of the Ruler under a covenant between the Ruler and the Government of India, on payment of compensation, under Art. 31 (2) of the Constitution;<sup>16</sup> or the fixation of fair and equitable rents payable by the tenants of such lands;<sup>17</sup> or the protection of tenants from eviction from such lands;<sup>18</sup> or the imposition of such reasonable restrictions as may be legitimately imposed upon other landlords in the interests of the tenants.<sup>19</sup>

**363. (1)** Notwithstanding anything in this Constitution

but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

(2) In this article—

- (a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and
- (b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

**Scope of Art. 363 (1).**

1. No Court shall have jurisdiction to entertain a dispute arising out of treaties etc., entered into between Rulers of Indian States and the Government of India. The jurisdiction of the Supreme Court is also barred by Proviso (i) to Art. 131; if it is a State which has lost its integrity by reason of merger or otherwise, the jurisdiction is barred by Art. 363 (1). The cause of action relating to such disputes is political in nature, and the remedy provided by the Constitution is—a reference by the President to the Supreme Court under Art. 143.<sup>20</sup>

2. While Art. 363 (1) postulates the continued operation of the treaties, agreements etc., entered into or executed before the commence-

16. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (267).

17. *Srikaran v. Ramanathan*, A. 1957 Orissa 24.

18. *Jagannath v. Harihar*, A. 1958 S.C. 239 (243): (1958) S.C.R. 1067.

19. *State of Seraikella v. Union of India*, (1951) S.C.R. 474: (1950-1) C.C. 271.



ment of the Constitution and giving rise to disputes, it does not require, as a condition of its application, that such disputes, should arise *after* the commencement of the Constitution. The time factor is related to the *instruments* and not the disputes. In order that the bar under Art. 363 (1) is to apply, such instrument should have been executed before the Constitution came into force and has to be in operation after the Constitution, but the dispute which is the subject-matter of the litigation may arise before or after.<sup>19</sup>

3. While the Proviso to Art. 131 bars the original jurisdiction of the Supreme Court in disputes arising out of such treaties and agreements, Art. 363 bars the jurisdiction of all Courts and in respect of all proceedings.<sup>20</sup>

The Merger agreements entered into by Rulers of Indian States before the commencement of the Constitution come under the present Article.<sup>21</sup>

4. Even where a private person has certain privileges<sup>22</sup> or even contractual rights<sup>23</sup> or benefits<sup>24</sup> following from a Covenant entered into by an ex-Ruler, he cannot enforce the Covenant in a Court of law, whether he was a party to such Covenant or not. Apart from Art. 363, the Covenant is an 'Act of State' and is not enforceable against the new Sovereign who acquires the territory of the ex-Ruler, unless the new Sovereign chooses to recognise them,<sup>25</sup> by a specific and unequivocal act.<sup>26</sup>

5. But the bar under Art. 363 (1) is attracted only if the dispute 'arises out of the Covenant'. Thus, where an individual had a right under a law which is not affected by or is independent of<sup>27</sup> the Covenant, the individual is not barred from enforcing his legal rights in the courts.<sup>28</sup> In such suit, the individual does not seek to enforce any right arising from the Covenant.<sup>29</sup>

### 364. (1) Notwithstanding anything in this Constitution,

Special provisions the President may by public notification as to major ports direct that as from such date as may be and aerodromes. specified in the notification—

(a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

(b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

20. *Pravir v. State of M. P.*, A. 1953 Nag. 86.

21. *Umeg Singh v. State of Bombay*, A. 1955 S.C. 540.

22. *Dalmia Cement Co. v. I. T. Commr.*, A. 1958 S.C. 816.

22a. *Raghubar v. State of U. P.*, A. 1959 S.C. 909.

23. *Amar Singhji v. State of Rajasthan*, A. 1955 S.C. 504 (523) ; (1955) 2 S.C.R. 303.

24. *Jagannath v. Harihar*, A. 1958 S.C. 239 ; (1958) S.C.R. 1067.

25. *Bholanath v. State of Saurashtra*, A. 1954 S.C. 680.

1. *State of M. B. v. Behramji*, A. 1958 M.P. 71.

(2) In this article—

- (a) "major port" means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port ;
- (b) "aerodrome" means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

**365.** Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

**366.** In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

Definitions

- (1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;
- (2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;
- (3) "article" means an article of this Constitution ;
- (4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly ;
- (5) "clause" means a clause of the article in which the expression occurs ;
- (6) "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled :—
  - (a) that it is not chargeable in respect of agricultural income ;
  - (b) that no deduction in respect of the tax paid by companies is, by any enactments which may

2. Article 365 shall not apply to the State of Jammu and Kashmir.



apply to the tax, authorised to be made from dividends payable by the companies to individuals ;

- (c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals ;
- (7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question ;
- (8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly ;
- (9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass ;
- (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation ;

#### "Law".

1. Law in this clause means statute law, including subordinate legislation, i.e., any rule, regulation or order made under statutory authority.<sup>3</sup> Though 'notifications' are mentioned in this clause, where notifications are issued under statutory power<sup>4</sup> (as distinguished from executive notifications), they themselves have the force of law.<sup>5</sup>

2. The word 'passed' in this definition can only mean as "having received the sanction or imprimatur of the Legislature or legislative authority". Customary law is thus excluded from the present defini-

3. *Edwards Mills v. State of Ajmer*, A. 1955 S.C. 25 : (1955) 1 S.C.R. 735.

4. *State v. Gopal Singh*, A. 1956 M.B. 138 (F.B.) ; *State v. Gokulchand*, A. 1957 M.P. 145.

5. *State of Bombay v. Balsara*, A. 1951 S.C. 318.

tion,"<sup>6</sup> though it is a 'law in force' within the meaning of Art. 372, *Expl. I*. Similarly, though Hindu Law has been applied in the administration of justice by directions of competent legislature, it does not follow that Hindu law was 'passed or made' by a Legislature. It cannot, therefore, be said to be an "existing law" within this definition,"<sup>7</sup> though it is included in the definition of 'law in force' in Explanation I of Art. 372, *post*, where the definition uses the word 'includes' instead of the word 'means' which is used in the present definition of 'existing law'.

### "Order".

The definition, read as a whole, shows that it is only orders having the force of law, and not mere executive orders, that are included within this definition."<sup>8</sup>

### "Rule".

Rule means—

"a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment".<sup>9</sup>

Service Rules made under s. 241 (2) of the Government of India Act, 1935,<sup>10</sup> come under the present definition.

### "Regulation".

Regulation means—

"a Regulation made by the Central Government under the Government of India Acts."<sup>11</sup>

A Regulation made under s. 266 (3) of the Government of India Act, 1935 would continue after the commencement of the Constitution by virtue of this clause.<sup>12</sup>

### "Passed or made".

What is material for the definition is the time of enactment of the law. If the Act was *passed* before the commencement of the Constitution, it would be 'existing law' within the meaning of the present definition even though it was brought into operation *after* the commencement of the Constitution.<sup>13</sup>

### "Having power to make such law".

These words indicate that the definition of Art. 366 (10) does not obviate the question of *competence*<sup>14</sup> of the Legislature which made the law. Thus, it has been held<sup>15</sup> that since the Essential Supplies Act, 1946, passed by the Indian Legislature, could not, at that time extend to the Indian States, and was not extended to Rajasthan prior to the commencement of the Constitution, the Act cannot be said to be an 'existing law' in Rajasthan.

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935 ;

6. *Moti Bai v. Kand Kari*, A. 1954 Hyd. 161 (163).
7. *Biswambhar v. State of Orissa*, A. 1957 Orissa 247 (252).
8. *Motilal G. Uttar Pradesh*, A. 1951 All. 257 (323).
9. General Clauses Act (X of 1897) Sec. 3 (51).
10. *Kamlacharan v. Post Master-General*, A. 1955 Pat. 381 (384).
11. General Clauses Act (X of 1897), S. 3 (50).
12. *Jaedish v. State of U. P.*, A. 1957 All. 436.
13. *Katti v. State of Madras*, (1954) 1 M.L.J. 117 (130); *State of Bombay v. Heman*, A. 1952 Bom. 6.
14. *Khanderwal v. State of U. P.*, A. 1955 All. 12.
15. *Ramjidas v. State of Rajasthan*, A. 1954 Raj. 97 (98).



- (12) "goods" includes all materials, commodities, and articles ;

**Goods.**

The definition of 'goods' in the Sale of Goods Act, 1930, is ordinarily followed in interpreting the present clause.<sup>16</sup>

- (13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount ;
- (14) "High Court" means any court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—
- (a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and
  - (b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution ;
- (15) "Indian State" means any territory which the Government of the Dominion of India recognised as such a State ;
- (16) "Part" means a Part of this Constitution ;
- (17) "pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund ;
- (18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 352 ;
- (19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State ;
- (20) "railway" does not include—
- (a) a tramway wholly within a municipal area, or
  - (b) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway ;
- (21) Omitted.<sup>17</sup>

16. *Kulkarni v. The State*, A. 1937 M.P. 45.

17. Cl. (21) has been omitted by the Constitution (Seventh Amendment) Act, 1956.

- (22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler ;
- (23) "Schedule" means a Schedule to this Constitution ;
- (24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution ;
- (25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution ;
- (26) "securities" includes stock ;
- (27) "sub-clause" means a sub-clause of the clause in which the expression occurs ;
- (28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly ;

**'Impost'.**

"Impost" means a compulsory levy and would include contributions payable by employers under the Employees' State Insurance Act, 1948," a toll levied under the statutory authority."

- (29) "tax on income" includes a tax in the nature of an excess profits tax ;
- (30) "*Union territory*" means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule.<sup>20</sup>

**367.** (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein  
 Interpretation. under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State . . . shall be construed as including a

18. *Anand v. Employees' Corpn.*, A. 1957 All. 136 (141).

19. *Wadhvani v. State of Rajasthan*, A. 1958 Raj. 138 (139).

20. Substituted by the Constitution (Seventh Amendment) Act, 1956.



reference to an Ordinance made by the President or, to an Ordinance made by a Governor . . . . , as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India :

Provided that, subject to the provisions of any law made by Parliament, the President may by order<sup>21</sup> declare any State not to be a foreign State for such purposes as may be specified in the order.<sup>22</sup>

## PART XX

### AMENDMENT OF THE CONSTITUTION

**368.** An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House

of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a

majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

21. See the Constitution (Declaration as to Foreign States) Order, 1950.

22. In its application to the State of Jammu and Kashmir, to article 367, the following clause shall be added :—

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as reference to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the Government of the said State shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers;

(c) references to a High Court shall include references to the High Court of Jammu and Kashmir;

(d) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and

(e) references to the Governor shall be construed as references to the person for the time being recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat "

1. In its application to the State of Jammu and Kashmir, to article 368, the following proviso shall be added :

"Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370."

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States . . . by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

#### **Different modes for alteration of the provisions of the Constitution.**

The Indian Constitution lays down three different modes of alteration of its different provisions :

I. A very large number of provisions are open to alteration by the Union Parliament, by a simple majority, viz., the matters referred to in Arts. 24, 169 and 240 :

- (a) Creation of new States or reconstitution of existing States.<sup>2</sup>
- (b) Creation or abolition of Upper Chambers in the State.<sup>3</sup> (c) Constitution of Centrally administered areas.<sup>4</sup> (d) Administration of Scheduled Areas and Scheduled Tribes.<sup>5</sup>

These matters will *not* be treated as "amendments of the Constitution".

If, however, a matter is not covered by any of these articles, e.g., cession of territory to a foreign power, that can be effected only by enacting an Amendment Act under Art. 368.<sup>6</sup>

II. In the case of a few matters relating to the federal structure of the Constitution, a special mode is prescribed, viz., that the Bill for amendment must be passed by a two-thirds majority of the members of each House present and voting (such majority being more than 50% of the total membership of each House) then, and ratified by the Legislatures of half of the States. [Proviso to Art. 368]. These matters are—

- (a) The manner of election of the President.<sup>7</sup> (b) Extent of the executive power of the Union and the States.<sup>8</sup> (c) The Supreme Court and the High Courts.<sup>9</sup> (d) Distribution of legislative powers between the Union and the States.<sup>9</sup> (e) Representation of States in Parliament.<sup>9</sup> (f) Provisions of Art. 368 itself.

III. The remaining provisions of the Constitution shall be liable to be amended by Parliament by a majority of two-thirds of the members of each House present and voting, provided such majority exceeds 50% of the total membership of that House [Art. 368]. No

2. Art. 4 (2).

3. Art. 169 (3).

4. Art. 240 (2).

5. Paragraph 7 of the 5th Schedule and Paragraph 21 of the 6th Schedule.

5a. Ref. on Agreement relating to Berubari Union, A. 1960 S.C. 845.

6. Arts. 54-5.

7. Arts. 73, 162.

8. Art. 241, Ch. IV of Part V, Ch. V of Part VI.

9. Ch. I of Part XI, 7th Sch.



ratification by the State Legislatures will be required for these amendments.

### Principles relating to amendment of the Constitution.

(a) Subject to the special procedure laid down in Art. 368, *our* Constitution vests *constituent* power upon the ordinary Legislature of the Union, i.e., the Parliament and there is no separate body for amending the Constitution, as exists in some other Constitution.

(b) Subject to the provisions of Art. 368, Constitution Amendment Bills are to be passed in the same way as ordinary Bills.

(c) No provision of the Constitution is immune from constitutional amendment and, provided the procedure as laid down in Art. 368 is complied with, Parliament may, by a Constitution Amendment Act, amend Art. 368 itself. It is possible to cede a part of the territory of India by amending Art. 1.<sup>10</sup>

(d) The Courts are competent to examine the validity of a Constitution Amendment Bill, but the scope of enquiry seems to be limited to see whether the provisions of Art. 368 have been complied with or violated.<sup>11</sup>

### Amendment of Fundamental Rights.

It is clear from the above, that in *our* Constitution, the provisions relating to the Fundamental Rights (Part III) have no special sanctity and that they may be amended, like any other provision of the Constitution, by the special majority of Parliament as laid down in the first paragraph of Art. 368. Notwithstanding Art. 13, therefore, the Fundamental Rights have no immunity from being amended by the Union Legislature itself, in the ordinary legislative procedure, provided only the prescribed majority passes the amendment Bill.

## PART XXI

### TEMPORARY AND TRANSITIONAL PROVISIONS

**1369.** Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely:—

Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.

(a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or *kapas*), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica ;

(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and

10. Ref. on Agreement relating to Berubari Union, A, 1960 S.C. 845.

11. *Sankari Prasad v. Union of India*, (1950-51) C.C. 284.

1. Article 369 shall not apply to the State of Jammu and Kashmir.

powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court ;

but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

**370.** Notwithstanding anything in this Constitution,—

Temporary provisions with respect to the State of Jammu and Kashmir.

- (a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir ;
- (b) the power of Parliament to make laws for the said State shall be limited to—
  - (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State ; and
  - (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948 ;

- (c) the provisions of article 1 and of this article shall apply in relation to that State ;
- (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State :

Provided further that no such order which relates to matters other than those referred to in



the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify :

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

#### CL. (1) (d) : 'Modifications'.

The power to 'modify' includes the power to enlarge or add to an existing provision.<sup>2</sup>

**Declaration under Art. 370(3).**—In exercise of the power conferred by Art. 370 (3), the President has substituted the Explanation to Art. 370 (1) as follows :

"*Explanation*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the *Sadar-i-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office."

**371.** <sup>1</sup>(1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Andhra Pradesh or Punjab, provide for the constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees.

(2) Notwithstanding anything in this Constitution, the President may by order made with respect to the State of

2. See the Constitution (Application to Jammu and Kashmir) Order, 1954, made by the President—In exercise of the powers conferred by clause (1) of article 370 of the Constitution, with the concurrence of the Government of the State of Jammu and Kashmir. [See C 3, Vol. II, pp. 593 *et seq.*], as amended by the Amendment Orders of 1958.

3. *Sant Singh v. State of J. & K.*, A. 1959 J. & K. 35 (40).

4. Substituted by the Constitution (Seventh Amendment) Act, 1956.

*Bombay, provide for any special responsibility of the Governor for—*

- (a) the establishment of separate development boards for Vidarbha, Marathwada, the rest of Maharashtra, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly ;
- (b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole ; and
- (c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole.

**Amendment.**—The Constitution (Seventh Amendment) Act, 1956, has substituted the present Article for the original Article which ran as follows :

"371. Notwithstanding anything in this Constitution during a period of ten years from commencement thereof or during such longer or shorter period as Parliament may by law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President :

Provided that the President may by order direct that the provisions of this article shall not apply to any State specified in the order."

**Object of Amendment.**—The object of the new Article is to enable the President to constitute regional committees of the State Legislative Assemblies of Andhra Pradesh and Punjab and secure their proper functioning by directing suitable modifications to be made in the rules of business of Government and in the rules of procedure of the Assembly.

**372.** (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein

Continuance in force of existing laws and their adaptation.

5. In its application to the State of Jammu and Kashmir in article 372,—

(i) clauses (2) and (3) shall be omitted;

(ii) references to the laws in force in the territory of India shall include references to *hidayats, ahlans, ishtihars*, circulars, *rodkars, irshads, yadashts* State Council Resolutions, Resolutions of the Constituent Assembly, and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and

(iii) references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e., the 14th May, 1954.



until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of [three years]<sup>6</sup> from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

*Explanation I.*—The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

*Explanation II.*—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

*Explanation III.*—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

*Explanation IV.*—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this

6. Substituted by the Constitution (First Amendment) Act, 1951, s. 12 for "two years".

article shall be construed as continuing any such Ordinance in force beyond the said period.

### Object of Art. 372.

The object of clause (1) of this Article is to sanction the continuance of the existing laws (notwithstanding the repeal of the Government of India Act, 1935 by Art. 395<sup>7</sup>) until they are repealed or amended by a competent authority under the new Constitution.

### Cl. (1): 'Subject to the other provisions of the Constitution'.

1. Thus, though an existing law continues to be in force under the present Article, it cannot contravene any provision of the Constitution, e.g., Art. 226 or 227,<sup>8</sup> or 254.<sup>9</sup>

2. It has been held that the provisions of Arts. 72, 161 and 238 of the Constitution are inconsistent with the prerogative power of the ex-Rulers of Indian States to grant suspension or remission of death sentences and the latter power must, therefore, be deemed to have been superseded by the Constitution.<sup>10</sup>

3. On the other hand,—

(a) The principle of priority of Crown debts (i.e., debts due to the State) is not inconsistent with anything in the republican Constitution, because it is essential to the proper functioning of every State that debts due to the public funds should have a priority over debts due to private individuals.<sup>11</sup>

(b) The competence of the Legislature to enact the law has to be determined with reference to the time when the law was made and not with reference to the provisions of the Constitution.<sup>12</sup>

### Repeal may be retrospective.

The competent Legislature under the new Constitution may repeal the existing laws with retrospective effect, and even with effect from dates earlier than when the Constitution comes in force.<sup>13</sup>

### Repeal may be express or implied.

As in the case of repeal of other laws, the repeal of any of the 'law in force' may be also implied by an interpretation of some provision of the Constitution or some subsequent Act of the Legislature.

Thus, it has been held<sup>14</sup> that the prerogative power of the ex-Rulers of Indian States has been taken away either by Arts. 72, 161 and 238 of the Constitution which are inconsistent with any prerogative or by Act I of 1951 which extended the provisions of the Criminal Procedure Code (which contains ss. 401, 402 and 402A) to all Part B States.

### "All the law in force".

1. This expression includes not only the enactments of the Indian Legislature but also the common law of the land which was being administered by the Courts in India. This includes not only the *personal laws*, viz., the Hindu and Mahomedan laws, but also the rules

7. *State of U. P. v. Jagmander*, A. 1954 S.C. 683.

8. *Motilal v. State*, A. 1952 All. 963 (1964).

9. *Pannalal v. Hyderabad State*, A. 1952 Hyd. 187.

10. *Varad v. State of T. C.*, (1956) S.C.A. 488 (493).

11. *B. S. Corporation v. Union of India*, A. 1956 Cal. 26 (31); *Bank of India v. Bowman*, A. 1955 Bom. 305.

12. *Kanpur Oil Mills v. Judge, Sales Tax*, A. 1955 All. 90.

13. *Union of India v. Madangopal*, (1954) S.C.R. 541.



of English Common law, e.g., the law of torts<sup>13a</sup> as well as customary laws.<sup>14,15</sup>

2. It is to be noted that the definition of "law in force" in Explanation I of the present Article differs from the definition of "existing law" in Art. 366 (10) in this that while the word "means" is used in Art. 366 (10), the word "includes" is used in the present Explanation. Case-law or judicial decisions are thus included in the expression 'law in force' in Art. 372.<sup>16</sup>

3. Both in Arts. 366 (10) and 372, law also includes subordinate legislation.<sup>17</sup> Thus, by virtue of this Article (or Art. 225), rules made by the High Courts under the Government of India Act shall continue in force, subject to the Constitution, until repealed or altered by a competent Legislature.<sup>18</sup> Similarly, rules, regulations and orders made by the Government, which were legislative in nature, would come within the purview of this Explanation.<sup>17,19</sup> Thus, an Order made by the Governor-General under s. 94 (3) of the Government of India Act 1935, investing the Chief Commissioner with the authority to administer a Chief Commissioner's Province is in nature of a legislative provision and is, accordingly, a 'law in force' within the meaning of Art. 372.<sup>17</sup>

4. Mere executive or administrative orders, however, would not come within the purview of either Art. 366 (10) or 372,<sup>17, 20</sup> such as Army Instructions No. 212.<sup>21</sup> Similarly, while statutory notifications would be 'law in force'<sup>22</sup> executive notifications would not.<sup>17, 23</sup>

5. "All the law" would also include those Acts of the British Parliament which were applicable to India on the date of the commencement of the Constitution.<sup>24</sup> The language of some British statutes has, however, rendered them inapplicable to India after the Constitution, for, India is no longer a 'British Possession' or a 'Dominion' and statutes which extend to 'British Possessions' or 'Dominions' can no longer be applicable to India.<sup>24,25</sup> Such a British statute cannot even be adapted under cl. (2) of the present Article. It can be made a part of post-Constitution law only by appropriate Indian legislation.<sup>24</sup>

6. The Letters Patent relating to the three Presidency High Courts, issued by the Crown would also come within this expression.<sup>18, 1</sup> So also the laws made by the ex-Rulers of Indian States.<sup>2</sup>

#### Cl. (2): 'Shall not be questioned in any court of law'.

I These words preclude an attack on the Adaptation Order on the ground that it does more than merely bring the existing law

13a. *Director of Rationing v. Corpn. of Calcutta*, (1960) S.C. [Cr. A. 158/56].

14. Cf. *United Provinces v. Atiqua*, A. 1941 F.C. 16 (Jf).

15. *N. C. Bose v. Deb*, A. 1956 Cal. 222 (224); *Motesingh v. Chandra*, A. 1959 M.P. 212; In the matter of *Basanta Chandra Ghosh*, A. 1960 Pat. 430 (446) F.B.

16. Cf. *Province of Bengal v. Hingalkumari*, A. 1946 Cal. 217 (224); *S. Gopalan v. State of Madras*, A. 1958 Mad. 538 (543).

17. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735 (746).

18. *Seshadri v. Prov. of Madras*, A. 1954 Mad. 543 (547).

19. *In re Ranganayakulu*, A. 1956 Andhra 161 (F.B.).

20. *Gurbachan v. State of Pepsu*, A. 1956 Pepsu 26 (28).

21. *Atindra v. Gillot*, A. 1955 Cal. 543.

22. *State v. Gokulchand*, A. 1957 M.P. 145.

23. *John v. State*, A. 1956 T.C. 117 (118).

24. Cf. *State of Madras v. Menon*, (1955) 1 S.C.R. 280.

25. See, however, *Blackwood v. Parasuraman*, A. 1959 Mad. 410.

1. *Nirmalchand v. Parmeswari*, A. 1958 M.P. 332 (335).

2. *Desai v. State of Bombay*, (1960) S.C. [Cr. A. 70/56].

into conformity with the Constitution and is, in consequence, *ultra vires* the powers conferred by Art. 372 (2).<sup>3</sup>

2. But they do not protect the Adaptation Order from being challenged on the ground that it contravenes *some other* provision of the Constitution.<sup>4</sup>

#### Expl. 1 : 'Shall include'.

These words show that the definition in Expl. 1 is not exhaustive.<sup>5</sup> Hence, it includes—

(a) An Order issued by the Governor-General under the Government of India Act, 1935, provided it was a *legislative* as distinguished from an administrative order.<sup>6</sup>

(b) The doctrine of priority of debts due to the State which was a part of the law prior to the commencement of the Constitution and which is not inconsistent with the republican form of Government under the Constitution.<sup>7</sup>

(c) Rules made by the High Courts in exercise of the powers conferred by the Letters Patent, prior to the commencement of the Constitution.<sup>8</sup>

(d) Orders under the Indian Independence Act, 1947, such as the Indian Independence (Legal Proceedings) Order, 1947.<sup>9</sup>

#### 'Competent Legislature'.

This means that when the law was passed, the Legislature which enacted it had legislative power with respect to the subject-matter of the legislation. It does not matter if that Legislature has ceased to have that power under the Constitution,<sup>10</sup> by reason of a redistribution of legislative powers by the Constitution.<sup>11</sup>

#### Validity of subordinate legislation issued after the Constitution.

So long as an existing law continues to remain in operation by virtue of Art. 372, the power conferred by such law to make subordinate legislation also continues to remain valid, so that an order or notification may be issued under such law even after the commencement of the Constitution even though the Legislature which enacted the law has lost the power to make a new law relating to the subject.<sup>12</sup>

#### 'And not previously repealed'.

The Article has no application to laws which had expired or been repealed prior to 26-1-50.<sup>13</sup>

#### 'Notwithstanding that . . . in particular areas'.

1. The object of Expl. I is to make it clear that any unrepealed enactment of a competent Legislature, which was in existence at the commencement of the Constitution will be a 'law in force' within the meaning of Art. 372 (1), even though it has not been brought into force in any part of India or any particular area of India<sup>14</sup> or of the State.<sup>15</sup> If this Explanation had not been inserted, 'law in force'

3. *Sundaramam v. State of A. P.*, A. 1958 S.C. 468 (488) : (1959) S.C.R. 1422.

4. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

5. *B. S. Corporation v. Union of India*, A. 1956 Cal. 26 (31).

6. *In re Ranganayakulu*, A. 1956 Andhra 161 (164) F.B.

7. *N. C. Bose v. Deb*, A. 1956 Cal. 222.

8. *Kanpur Oil Mills v. Judge, Sales Tax*, A. 1955 All. 99.

9. *Dulat v. Dt. Magistrate*, A. 1958 Cal. 365 (373).

10. *Indar Singh v. State of Rajasthan*, (1957) S.C.R. 605 (620).

11. *State of U. P. v. Jagananda*, A. 1954 S.C. 683.

12. *Jotindra v. Lala Prasad*, A. 1956 Pat. 496.



would have included only such laws which were actually in operation at the commencement of the Constitution.<sup>13</sup>

2. It has been held by the Rajasthan High Court<sup>14</sup> that by reason of these words, it was possible for the Rajasthan Government to extend the Police Act, 1861 to Rajasthan even after the commencement of the Constitution, though 'Police' is a State subject under the Constitution, while the Police Act is a Central enactment.

**372A.** <sup>15-16</sup> (1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made and any such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

**373.** Power of President to make order in respect of persons under preventive detention in certain cases.<sup>17</sup>

**1374.** (1) The Judges of the Federal Court holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 125 in respect of the Judges of the Supreme Court.

Provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.

13. *Kutti v State of Madras*, A. 1954 Mad. 621.

14. *Ran Bahadur v. Hanuwant*, A. 1957 Raj. 27.

15. Inserted by the Constitution (Seventh Amendment) Act, 1956.

16. Art. 372A shall not apply to the State of Jammu and Kashmir.

17. This article has ceased to have effect. Hence, not reproduced.

18. In its application to the State of Jammu and Kashmir in article 374,—

(i) clauses (1), (2), (3) and (5) shall be omitted;

(ii) in clause (4), the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board constituted under the Jammu and Kashmir Constitution Act, 1896, and references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e., the 14th May, 1954.

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

**375.** All courts of civil, criminal and revenue jurisdic-

Courts, authorities and officers to continue to function subject to the provisions of the Constitution.

tion, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution.

**376.** (1) Notwithstanding anything in clause (2) of article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 221 in respect of the Judges of such High Court.

Provisions as to Judges of High Courts.



<sup>20</sup>[Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court].

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clause (1) and (2) of article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

<sup>21</sup>**377.** The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as are provided for under clause (3) of article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

<sup>21</sup>**378.** (1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the

20. Added by the Constitution (First Amendment) Act, 1951, s. 13.  
21. Not applicable to the State of Jammu and Kashmir.

commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

<sup>22-23</sup>**378A.** Notwithstanding anything contained in article 172, the Legislative Assembly of the State of Andhra Pradesh as constituted under the provisions of sections 28 and 29 of the States Reorganisation Act, 1956, shall, unless sooner dissolved, continue for a period of five years from the date referred to in the said section 29 and no longer and the expiration of the said period shall operate as a dissolution of that Legislative Assembly.

**379-91.** Omitted.<sup>24</sup>

<sup>25</sup>**392.** (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the Provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Power of the President to remove difficulties.

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by article 324, by clause (3) of article 367 and by article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

22. Inserted by the Constitution (Seventh Amendment) Act, 1956.

23. Not applicable to the State of Jammu and Kashmir.

24. Arts. 379-391, containing transitional provisions relating to the Provisional Legislatures and the like, have been omitted by the Constitution (Seventh Amendment) Act, 1956.

25. Not applicable to the State of Jammu and Kashmir.



**Scope of the power to adapt.**

The scope of the power conferred upon the President by cl. (1) was very wide and he was competent to make an adaptation, by modifying, adding to, or omitting from the existing provisions.<sup>1</sup>

## PART XXII

**SHORT TITLE, COMMENCEMENT AND REPEALS**

**393.** This Constitution may be called  
Short title. the Constitution of India.

**394.** This article and articles 5, 6, 7, 8, 9, 60, 324, 366,  
367, 379, 380, 388, 391, 392 and 393 shall come into force at  
Commencement. once, and the remaining provisions of this  
Constitution shall come into force on the  
twenty-sixth day of January, 1950, which day is referred to in  
this Constitution as the commencement of this Constitution.

**395.** The Indian Independence Act, 1947, and the  
Government of India Act, 1935, together with all enactments  
amending or supplementing the latter Act,  
Repeals. but not including the Abolition of Privy  
Council Jurisdiction Act, 1949, are hereby repealed.

**Effect of repeal.**

Notwithstanding the repeal of the Government of India Act, 1935  
or the Indian Independence Act, 1947, the laws made under the Act  
of 1935<sup>2</sup> or the Orders made under the Indian Independence Act,  
1947, continue to be in force by virtue of Art. 372 (1), *ante*.

**FIRST SCHEDULE<sup>1</sup>**

[Articles 1 and 4]

**I. THE STATES**

Name	Territories
1. <i>Andhra Pradesh</i> ...	<i>The territories specified in sub-section (1) of section 3 of the Andhra State Act, 1953, . . . sub-section (1) of section 3 of the States Reorganisation Act, 1956, and the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act 1959, but excluding the territories specified in the second schedule to the last mentioned Act.</i> <sup>2</sup>

1. *Garewal v. State of Punjab*, A. 1959 S.C. 512 (516).

1. Substituted by the Constitution (Seventh Amendment) Act, 1956.

2. *Edward Mills v. State of Ajmer*, (1955) 1 S.C.R. 735.

3. *N. C. Bose v. Deb*, A. 1956 Cal. 222.

Name	Territories
2. Assam ...	... The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951. <sup>1</sup>
3. Bihar ...	... The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, but excluding the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956. <sup>1</sup>
4. Bombay	... The territories specified in sub-section (1) of section 8 of the States Reorganisation Act, 1956, <sup>1</sup> but excluding the territories referred to in sub-sec. (1) of section 3 of the Bombay Reorganisation Act, 1960. <sup>2</sup>
5. Gujarat ...	... The territories referred to in sub-section (1), of section 3 of the Bombay Reorganisation Act, 1960. <sup>4</sup>
*6. Kerala ...	... The territories specified in sub-section (1) of section 5 of the States Reorganisation Act, 1956. <sup>3</sup>
*7. Madhya Pradesh ...	... The territories specified in sub-section (1) of section 9 of the States Reorganisation Act, 1956 <sup>3</sup> and the First schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959. <sup>6</sup>

1. Substituted by the Constitution (Seventh Amendment) Act, 1956.

2. Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.

3. Substituted by the Bombay Reorganisation Act (11 of 1960).

4. Added by the Bombay Reorganisation Act (11 of 1960).

5. Renumbered by *ibid.*

6. Added by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.



Name	Territories
8. Madras ...	... The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in section 4 of the States Reorganisation Act, 1956 <sup>7</sup> , and the second schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 <sup>8</sup> but excluding the territories specified in sub-section (1) of section 3 and sub-section (1) of section 4 of the Andhra State Act, 1953, and the territories specified in clause (b) of sub-section (1) of section 5, section 6 and clause (d) of sub-section (1) of section 7 of the States Reorganisation Act, 1956 <sup>7</sup> and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959. <sup>8</sup>
9. Mysore ...	... The territories specified in sub-section (1) of section 7 of the States Reorganisation Act, 1956. <sup>7</sup>
10. Orissa ...	... The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province. <sup>7</sup>
11. Punjab ...	... The territories specified in section 11 of the States Reorganisation Act, 1956. <sup>7</sup>
12. Rajasthan	... The territories specified in section 10 of the States Reorganisation Act, 1956 <sup>7</sup> but excluding the territories specified in the First Schedule to

7. Substituted by the Constitution (Seventh Amendment) Act, 1956.

8. Inserted by the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.

Name	Territories
	<i>the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.</i>
13. Uttar Pradesh ...	<i>The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province.<sup>9</sup></i>
14. West Bengal ...	<i>The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of section 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.</i>
15. Jammu and Kashmir	<i>The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.</i>

## II. THE UNION TERRITORIES

Name	Extent
1. Delhi ...	<i>The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.</i>
2. Himachal Pradesh	<i>The territories which immediately before the commencement of this Constitution were being adminis-</i>

9. Added by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.

10. Substituted by the Constitution (Seventh Amendment) Act, 1956.



Name	Extent
	<i>tered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur.</i>
3. Manipur	... <i>The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.</i>
4. Tripura ...	... <i>The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.</i>
5. The Andaman and Nicobar Islands	<i>The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.</i>
6. The Laccadive Minicoy and Amin-divi Islands,	<i>The territory specified in section 6 of the States Reorganisation Act, 1956.</i>

## SECOND SCHEDULE

[Articles 59(3), 65(3), 75(6), 97, 125, 148(3), 158(3), 164(5), 186 and 221]

### PART A

#### PROVISIONS AS TO THE PRESIDENT AND THE GOVERNORS OF STATES \* \* \*<sup>1</sup>

1. There shall be paid to the President and to the Governors of the States . . . the following emoluments per mensem, that is to say :—

The President	...	...	10,000 rupees
The Governor of a State	...	...	5,500 rupees

1. Omitted by the Constitution (Seventh Amendment) Act, 1956.

2. There shall also be paid to the President and to the Governors of the States \* \* \*<sup>1</sup> such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of the States throughout their respective terms of office shall be entitled to the same privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

\* \* \*

## PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY \* \* \*<sup>2</sup> AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF A STATE.

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were payable to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly \* \* \*<sup>3</sup> and to the Chairman and the Deputy Chairman of the Legislative Council of a State such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately

2. Part B omitted by *ibid.*

3. Omitted by *ibid.*



before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

## PART D

### PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS. \* \* \* 4

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice	...	...	5,000 rupees
Any other Judge	...	...	4,000 rupees

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity<sup>5</sup>.

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of article 374, or

4. Omitted by *ibid.*

5. Substituted by the Constitution (Seventh Amendment) Act, 1956,

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Chief Justice) of the Supreme Court under the said clause,

during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. (1) *There shall be paid to the Judges of High Courts, in respect of time spent on actual service, salary at the following rates per mensem, that is to say,—*

<i>The Chief Justice</i>	...	... 4,000 rupees.
<i>Any other Judge</i>	...	... 3,500 rupees.

*Provided that if a Judge of a High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced—*

- (a) *by the amount of that pension, and*
- (b) *if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and*
- (c) *if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity ;*



(2) Every person who immediately before the commencement of this Constitution—

- (a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of article 376, or
- (b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause,

shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(3) *Any person who, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, was holding office as the Chief Justice of the High Court of a State specified in Part B of the First Schedule and has on such commencement become the Chief Justice of the High Court of a State specified in the said Schedule as amended by the said Act shall, if he was immediately before such commencement drawing any amount as allowance in addition to his salary, be entitled to receive in respect of time spent on actual service as such Chief Justice, the same amount as allowance in addition to the salary specified in sub-paragraph (1) of this paragraph.*

11. In this Part, unless the context otherwise requires,—

- (a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" including an *ad hoc* Judge ;
- (b) "actual service" includes—
  - (i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge ;
  - (ii) vacations, excluding any time during which the Judge is absent on leave ; and

7. Substituted for peras. (3) and (4), by the Constitution (Seventh Amendment) Act, 1956.

- (iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

**Amendment.**—The amendments, indicated by italics, have been made by the Constitution (Seventh Amendment) Act, 1956.

(i) The Proviso to Para 1 has been added by the Constitution (Seventh Amendment) Act, 1956, with the following object—

"Sometimes it becomes necessary to appoint a retired district judge as a judge of a High Court. In the absence of a legal provision for withholding the pension due to such a judge, it has been the practice to obtain from him an undertaking that he would not claim the pension for the period for which he serves as a High Court judge. Since this is obviously unsatisfactory, it is proposed to add a proviso to paragraph 10 (1) of the Second Schedule on the same lines as the proviso to paragraph 9 (1) thereof regulating the salary of a judge of the Supreme Court in similar circumstances."

(ii) The original cls. (3) and (4) have been substituted by the new cl. (3). The original clauses, relating to travelling allowances and leave of absence are no longer necessary as provision for these matters has now been made by the High Court Judges (Conditions of Service) Act, 1954.

## PART E

### PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the Comptroller and Auditor-General of India under article 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as references to the President.



### THIRD SCHEDULE<sup>1</sup>

[Articles 75(4), 99, 124(6), 148(2), 164(3), 188 and 219]

#### Forms of Oaths or Affirmations

##### I

Form of oath of office for a Minister for the Union :—

swear in the name of God

"I, A.B., do \_\_\_\_\_ that I will bear true  
solemnly affirm

faith and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and law, without fear or favour, affection or illwill."

##### II

Form of oath of secrecy for a Minister for the Union :—

swear in the name of God

"I, A.B., do \_\_\_\_\_ that I will not  
solemnly affirm

directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

##### III

Form of oath or affirmation to be made by a member of Parliament :—

"I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do swear in the name of God

\_\_\_\_\_ that I will bear true faith and  
solemnly affirm

allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

1. In its application to the State of Jammu and Kashmir, Forms V, VI, VII and VIII shall be omitted.

## IV

Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India :—

"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do \_\_\_\_\_ swear in the name of God \_\_\_\_\_ that I will bear \_\_\_\_\_ solemnly affirm

true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

## V

Form of oath of office for a Minister for a State :—

\_\_\_\_\_ swear in the name of God  
"I, A.B., do \_\_\_\_\_ that I will bear \_\_\_\_\_ solemnly affirm

true faith and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as a Minister for the State of..... and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

## VI

Form of oath of secrecy for a Minister for a State :—

\_\_\_\_\_ swear in the name of God  
"I, A.B., do \_\_\_\_\_ that I will not \_\_\_\_\_ solemnly affirm

directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of..... except as may be required for the due discharge of my duties as such Minister."

## VII

Form of oath or affirmation to be made by a member of the Legislature of a State :—

"I, A.B., having been elected (or nominated) a member



of the Legislative Assembly (or Legislative Council), do swear in the name of God

— that I will bear true faith and allegiance  
solemnly affirm

to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

### VIII

Form of oath or affirmation to be made by the Judges of a High Court:—

"I, A.B., having been appointed Chief Justice (or a Judge)  
swear in the name of God  
of the High Court at (or of) do.....  
solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws."

## FOURTH SCHEDULE<sup>1</sup>

[Articles 4 (1) and 80 (2)]

### Allocation of seats in the Council of States

To each State or Union territory specified in the first column of the following table, there shall be allotted the number of seats specified in the second column thereof opposite to that State or that Union territory, as the case may be.

TABLE

1. <i>Andhra Pradesh</i>	...	...	18
2. <i>Assam</i>	...	...	7
3. <i>Bihar</i>	...	...	22
4. <i>Bombay</i>	...	...	18 <sup>2</sup>
5. <i>Gujarat</i>	...	...	11 <sup>2</sup>
6. <i>Kerala</i>	...	...	9
7. <i>Madhya Pradesh</i>	...	...	16

1. Substituted by the Constitution (Seventh Amendment) Act, 1956.

2. Substituted by the Bombay Reorganisation Act, 1960.

3. Added by *ibid.*

8.	Madras	...	...	...	18 <sup>4</sup>
9.	Mysore	...	...	...	12
10.	Orissa	...	...	...	10
11.	Punjab	...	...	...	11
12.	Rajasthan	...	...	...	10
13.	Uttar Pradesh	...	...	...	34
14.	West Bengal	...	...	...	16
15.	Jammu and Kashmir	...	...	...	4
16.	Delhi	...	...	...	3
17.	Himachal Pradesh	...	...	...	2
18.	Manipur	...	...	...	1
19.	Tripura	...	...	...	1
TOTAL					223 <sup>5</sup>

## FIFTH SCHEDULE<sup>1</sup>

[Article 244 (1)]

### Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes

#### PART A

#### GENERAL

#### Administration of Scheduled Areas and Tribes.

The system of administration provided for the Scheduled Areas and Tribes as provided in Parts A and B of the Fifth Schedule may be summarised as follows :

The executive power of the Union shall extend to giving directives to the States regarding the administration of the Scheduled Areas.<sup>2</sup> Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor or Ruler.<sup>3</sup>

The Governor or Ruler is authorised to direct that any particular Act of Parliament or of the legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor or Ruler is also authorized to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land, and regulate the business of moneylending. All such regulations made by the Governor or Ruler must have the assent of the President.<sup>4</sup>

4. Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.

5. Substituted by *ibid*.

1. Not applicable to the State of Jammu and Kashmir.

2. Para. 9.

3. Para. 4.

4. Part. 5.



**1. Interpretation.**—In this Schedule, unless the context otherwise requires, the expression "State"<sup>5</sup> . . . . does not include the State of Assam.

**2. Executive power of a State in Scheduled Areas.**—Subject to the provisions of this Schedule, the executive Power of a State extends to the Scheduled Areas therein.

**3. Report by the Governor . . . . to the President regarding the administration of Scheduled Areas.**—The Governor . . . . of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

## PART B

### ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES.

**4. Tribes Advisory Council.**—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State:

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor . . . .

(3) The Governor . . . . may make rules prescribing or regulating, as the case may be,—

(a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof;

(b) the conduct of its meetings and its procedure in general; and

(c) all other incidental matters.

5. The words 'means . . . . but' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

**5. Law applicable to Scheduled Areas.** —(1) Notwithstanding anything in this Constitution, the Governor . . . . may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor . . . ., may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area ;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such area ;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor . . . . may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor . . . . making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

**Cl. (1): Governor's power to exclude application of Acts of Parliament or State Legislature.**

Acts of Parliament or of the appropriate Legislature apply to the Scheduled Areas of their own force, but the Governor has the power to exclude their operation by a notification. In the absence of such a notification, therefore, the Acts of the Legislature shall extend to such areas.<sup>4</sup>

**Cl. (2): Scope of Governor's power to make Regulations.**

While Cl. (1) gives the Governor the power of merely *applying* or *modifying* the application of Acts made by Parliament or the State Legislature Cl. (2) confers powers of *independent* legislation of great width. He is given plenary power of legislation concerning these Areas, by framing regulations 'for the peace and good government' of that



Area. He is the sole judge to decide whether the Regulation is required for the peace and good government of the Area in question. There is no doubt that the Governor has under the present Clause the power of retrospective legislation just as the State Legislature possesses. Again, the ambit of the present power of the Governor is *not restricted* to any particular Entry or Entries of the Legislative Lists in the 7th Schedule. The plenary nature and extent of this power is illustrated by Cl. (3) which says that in making any such Regulation, the Governor may override (repeal or amend) any Act of Parliament or of the State Legislature so far as its application to that Area is concerned. So, the power of the Governor to make Regulations, extends to all the three Lists of the 7th Schedule.<sup>7,8</sup>

The only limitations to the exercise of this plenary power are contained in Parss. 4 and 5, viz., that they must be (i) made on previous consultation of the Tribes Advisory Council where there is such a Council; and (ii) submitted to and assented to by the President.

## PART C

### SCHEDULED AREAS

**6. Scheduled Areas.**—(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

- (a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area ;
- (b) alter, but only by way of rectification of boundaries, any Scheduled Area ;
- (c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area ;

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under subparagraph (1) of this paragraph shall not be varied by any subsequent order.

## PART D

### AMENDMENT OF THE SCHEDULE

**7. Amendment of the Schedule.**—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the

7. *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (238).

8. *Chhatturam v. Commr. of I. T.*, (1947) F.L.J. 92.

Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## SIXTH SCHEDULE<sup>1</sup>

[Articles 244 (2) and 275 (1)]

### Provisions as to the Administration of Tribal Areas in Assam

#### Administration of Tribal Areas in Assam.

There are two Parts in the Table appended to this Schedule. The Areas in Part A shall be an 'autonomous district' by virtue of the Constitution,<sup>2</sup> and the provisions in Paras. 1-17 relate to the administration of these Autonomous districts. The Areas included in Part B, on the other hand, shall, in the first instance, be governed by the Governor of Assam acting in his discretion, as the agent of the President.<sup>3</sup> But by notification issued [under Cl. (1) of Para. 18] by the Governor with the previous approval of the President, the provisions of Paras. 1-17 relating to autonomous districts may be applied in whole or in part to any Area included in Part B.<sup>4</sup>

The Areas included in Part A are not outside the executive authority of the Government of Assam but provision is made for the creation of District Councils and Regional Councils. Again, barring such functions as law-making in certain specified fields, such as management of any forest other than a reserved forest, inheritance of property, marriage and social customs<sup>5</sup> and certain judicial functions<sup>6</sup> which are to be exercised by the District or Regional Councils, the authority of Parliament as well as that of the Assam Legislature extends over these Areas, under the general provisions of Art. 245 (1) unless the Governor, by notification, directs to the contrary.<sup>7</sup> All such laws made by these Councils, are to have no effect, unless assented to by the Governor.<sup>8</sup> The jurisdiction of the Supreme Court and High Court over such Regional Tribunals is not barred, but the High Court's power to entertain suits and cases as are mentioned in paragraph 4 (2), is subjected to regulation by Order of the Governor.<sup>9</sup>

#### 1. Autonomous districts and autonomous regions.—

(1) Subject to the provisions of this paragraph, the tribal areas

1. Not applicable to the State of Jammu and Kashmir.
2. Para. 1 (1).
3. Para. 18 (2)-(3).
4. Para. 18 (1).
5. Para. 3; 12 (a). As regards the matters enumerated in Para. 3, Acts of Parliament or of the Assam Legislature shall not apply to these Area, unless the District Council, by notification, so directs.
6. Para. 4.
7. Para. 12 (b).
8. Part. (3).
9. Para. 4 (3).



in each item of Part A of the table appended to paragraph 20 of this Schedules shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

- (a) include any area in Part A of the said table,
- (b) exclude any area from Part A of the said table,
- (c) create a new autonomous district,
- (d) increase the area of any autonomous district,
- (e) diminish the area of any autonomous district,
- (f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,
- (g) define the boundaries of any autonomous district :

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

**2. Constitution of District Councils and Regional Councils.**—(1) There shall be a District Council for each autonomous district consisting of not more than twentyfour members, of whom not less than three-fourths shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of "the District Council of (*name of district*)" and "the Regional Council of (*name of region*)", shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal

organisations within the autonomous districts or regions concerned, and such rules shall provide for—

- (a) the composition of the District Councils and Regional Councils and the allocation of seats therein ;
- (b) the delimitation of territorial constituencies for the purpose of elections to those Councils ;
- (c) the qualifications for voting at such elections and the preparation of electoral rolls therefor ;
- (d) the qualifications for being elected at such elections as members of such Councils ;
- (e) the term of office of members of such Councils ;
- (f) any other matter relating to or connected with elections or nominations to such Councils ;
- (g) the procedure and the conduct of business in the District and Regional Councils ;
- (h) the appointment of officers and staff of the District the Regional Councils.

(7) The District or the Regional Council may after its first constitution make rules with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules regulating—

- (a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business ; and
- (b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be :

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council :

Provided further that the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, of the North Cachar and Mikir Hills shall be the Chairman *ex-Officio* of the District Council in respect of the territories included in items 5 and 6 respectively of Part A of the table appended to paragraph 20 of this Schedule and shall have power for a period of six years after the first constitution of the District Council, subject to the control of the Governor, to annual or modify any resolution or decision of the District Council or to issue such instructions to the District Council, as he may consider appropriate, and the District Council shall comply with every such instruction issued.



**3. Powers of the District Councils and Regional Councils to make laws.** —(1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

- (a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town :

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of Assam in accordance with the law for the time being in force authorising such acquisition ;

- (b) the management of any forest not being a reserved forest ;  
(c) the use for any canal or water-course for the purpose of agriculture ;  
(d) the regulation of the practice of *jhum* or other forms of shifting cultivation ;  
(e) the establishment of village or town committees or councils and their powers ;  
(f) any other matter relating to village or town administration, including village or town police and public health and sanitation ;  
(g) the appointment or succession of Chiefs or Headmen ;  
(h) the inheritance of property ;  
(i) marriage ;  
(j) social customs.

(2) In this paragraph, a "reserved forest" means any area which is a reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

**4. Administration of justice in autonomous districts and autonomous regions.** —(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of

areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village Councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

- (a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph ;
- (b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph ;
- (c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph ;
- (d) the enforcement of decisions and orders of such Councils and courts ;
- (e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.



**5. Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.—**

(1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

**6. Powers of the District Council to establish primary schools, etc.—**The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads and waterways in the district and, in particular, may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

**7. District and Regional Funds.—**(1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

(2) Subject to the approval of the Governor, rules may be made by the District Council and by the Regional Council for the management of the District Fund or, as the case may be, the Regional Fund, and the rules so made may prescribe the

procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

**8. Powers to assess and collect land revenue and to impose taxes.**—(1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

- (a) taxes on professions, trades, callings and employments ;
- (b) taxes on animals, vehicles and boats ;
- (c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries ; and
- (d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraph (2) and (3) of this paragraph.

**Power to levy taxes.**

The power to levy taxes and land revenues in the areas coming under the Sixth Schedule is exclusively vested in the Regional and District Councils. Hence, after the commencement of the Constitution, the Lyngdoh has no power to levy any tax or fee.<sup>10</sup>

**9. Licences or leases for the purpose of prospecting for, or extraction of, minerals.**—(1) Such share of the royalties

10. *Nongdhar v. Durbar of the Lyngdoh*, A. 1958 Assam 33.



accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

**10. Power of District Council to make regulations for the control of money-lending and trading by non-tribals.—**

(1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending ;
- (b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender ;
- (c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council ;
- (d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council :

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council :

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

**11. Publication of laws, rules and regulations made under the Schedule.**—All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

**12. Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.**—(1) Notwithstanding anything in this Constitution—

(a) no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit ;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

**13. Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.**—The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under article 202.

**14. Appointment of Commission to inquire into and report on the administration of autonomous districts and**



**autonomous regions.**—(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

- (a) the provision of educational and medical facilities and communications in such districts and regions ;
- (b) the need for any new or special legislation in respect of such districts and regions ; and
- (c) the administration of the laws, rules and regulations made by the District and Regional Councils ;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.

**15. Annulment or suspension of acts and resolutions of District and Regional Councils.**—(1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India, he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made :

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the

date on which under this paragraph it would otherwise have ceased to operate.

**16. Dissolution of a District or a Regional Council.**—The Governor may on the recommendation of a Commission appointed under paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

- (a) direct that a fresh general election shall be held immediately for the reconstitution of the Council or
- (b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months;

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

**17. Exclusion of areas from autonomous districts in forming constituencies in such districts.**—For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

**18. Application of the provisions of this Schedule to areas specified in part B of the table appended to paragraph 20.**—(1) The Governor may—

- (a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and
- (b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.



(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of *Article 240*<sup>11</sup> shall apply thereto as if such area or part thereof were a *Union territory specified in that article*.<sup>11</sup>

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

**19. Transitional provisions.**—(1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely :—

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs ; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit ;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is 'for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

**'Existing law'.**

The Khasi States (Administration of Justice) Order, 1950, made by the Governor of Assam on 25-1-50, is an 'existing law' applicable to the Khasi States which is a 'tribal area' under para. 20 of Sch. VI of

11. Inserted by the Constitution (Seventh Amendment) Act, 1956.

the Constitution. Hence, so long as that order is not repealed by the Governor under the present clause, the administration of criminal justice in the Khasi States is to be governed by that Order.<sup>12</sup>

**20. Tribal areas.**—(1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem:

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

<sup>13</sup>(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

<sup>14</sup>(2B) The Naga Hills-Tuensang Area shall comprise the areas which at the commencement of this Constitution were known as the Naga Hills District and the Naga Tribal Area.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District and the Mizo District)<sup>13</sup> or administrative area (other than the Naga Hills-Tuensang Area)<sup>14</sup> shall be construed as a reference to that district or area at the commencement of this Constitution:

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

## TABLE

### PART A

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.

<sup>12</sup> *Farching v. The State*, A. 1952 Assam 3.

<sup>13</sup> Inserted by the Lushai Hills District (Change of Name) Act, 1954.

<sup>14</sup> Inserted by the Naga Hills-Tuensang Area Act, 1957.



3. *The Mizo District.*<sup>15</sup>
4. \* \* \*
5. The North Cachar Hills.
6. The Mikir Hills.

## PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. *The Naga Hills-Tuensang Area.*<sup>17</sup>

**'Area comprised within the Municipality of Shillong'.**

In view of these words in cl. (2) of Para. 20, the Siem of Myliem shall have no jurisdiction to decide civil disputes between tribals living in a territory which forms part of the Khasi and Jaintia Hills District but which is comprised within the Shillong Municipality.<sup>18</sup>

**21. Amendment of the Schedule.**—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the Provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## SEVENTH SCHEDULE

[Article 246]

**General rules for interpretation of the Entries.**

1. The various Entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation.<sup>1</sup> The power to legislate is given by Art. 246, and other Articles of the Constitution. Thus, the power to make a law authorising 'deprivation of property' is conferred by Art. 31. It cannot be contended that because there is no Entry in the Lists relating to 'deprivation of property' as such, it is not within the competence of the Legislatures of this country to enact such a law. Such a law could be made, for instance under Entry 1 of List I, 1 of List II or List III.<sup>2</sup>

15. The name of the Lushai Hills District was changed by the Lushai Hills District (Change of Name) Act, 1954.

16. Item 4 was omitted by the Naga Hills-Tuensang Area Act, 1957.

17. Inserted by *ibid.*

18. *U Owing v. Ka Naxibon*, A. 1956 Assam 129.

1. *Govindi v. State of U. P.*, A. 1952 All. 88.

2. *Shemdasani v. Central Bank of India*, (1952) S.C.R. 391.

2. The Entries in the Lists are mere legislative heads and are of an enabling character. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures. They neither impose any implied restrictions on the legislative power conferred by the Articles nor prescribe any duty to exercise that legislative power in any particular manner.<sup>3</sup>

3. The language of these Entries should be given the widest scope<sup>4</sup> of which their meaning is fairly capable because they set up a machinery of Government.<sup>4,5</sup> Each general word should, accordingly, be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it,<sup>6,7</sup> e.g., the validation of executive orders relating to the subject referred to in the Entry;<sup>8,9</sup> or the extinguishment of the rights relating to an Entry;<sup>10</sup> or the licensing and control of bonded warehouses for the purpose of making effective the realisation of an excise duty.<sup>9</sup>

4. The meaning of a word or expression in a particular Entry is to be determined with reference to the context in which it has been used, and the meaning of the same word or expression in the different Entries is not necessarily identical.<sup>11</sup>

5. Where an Entry begins with a word of general import, followed by words having reference to particular aspects thereof (e.g., Entry 18 of List II), the operation of the general words is not to be cut down by reason of the fact that there are sub-heads dealing with specific aspects.<sup>12</sup> The subsequent words are intended not to limit the ambit of the opening general term but rather to illustrate the scope and objects of the legislation comprised in the opening term;<sup>13</sup> or to remove doubts as to the wide scope of the meaning of the opening term or phrase.<sup>14</sup>

The expression 'that is to say' has, accordingly, been held as merely illustrative.<sup>15</sup>

### Conflict between Entries in different Lists.

1. The entries in the different Lists should be read together without giving a narrow meaning to any of them.<sup>16</sup> The powers of the Union and the State Legislatures are both expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power than to the other.<sup>16</sup>

Even where an Entry is framed in wide language, it cannot be so interpreted as to make it cancel or override another entry or make another entry meaningless.<sup>17</sup>

This rule is also applicable as between different entries of the same Lists.

2. Where one Entry is made 'subject to' another Entry, all that it means is that out of the scope of the former Entry, a field of legis-

3. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

4. *Hans Muller v. Supdt.*, (1985) 1 S.C.R. 1285 (1289).

5. *Western India Theatres v. Cantonment Board*, A. 1959 S.C. 582.

6. *Sri Ram v. State of Bombay*, A. 1959 S.C. 439 (463).

7. *J. T. Commrs. v. Benoy*, A. 1957 S.C. 768 (772).

8. *Chaturbhai v. Union of India*, A. 1960 S.C. 424 (428); *State of Rajasthan v. Chawla*, A. 1959 S.C. 544 (546).

9. *United Provinces v. Aliqa*, A. 1941 F.C. 16.

10. *State of Punjab v. Kehar Singh*, A. 1959 Punj. 8 (13) P.B.

11. *State of Madras v. Dunkerley & Co.*, A. 1958 S.C. 560.

12. *Manikkasundara v. Nayyudu*, (1946) F.C.R. 67 (84).

13. *United Provinces v. Aliqa*, (1940) F.C.R. 110 (134).

14. *State of Bombay v. Balsara*, (1951) S.C.R. 682.

15. *Ramkrishna v. Secy., Municipal Committee*, A. 1950 S.C. 11 (13).

16. *Kameshwar v. State of Bihar*, A. 1951 Pat. 91.



lation covered by the latter Entry has been reserved to be specially dealt with by the appropriate Legislature.<sup>18</sup>

3. When one item is general and another specific, the latter will exclude the former.<sup>19</sup>

#### Relation between different Entries in the same List.

1. Two items of the same Entry are not necessarily exclusive of each other and it is possible for the same matter to come under more than one Entries.<sup>20,21</sup> As between different Entries in the same List, the general scheme followed is that each particular Entry should relate to a separate subject or group of cognate subjects. But the different Entries are supplementary to each other and are *not limited* by each other in any way.<sup>22</sup> The point kept in view in drawing up the lists was not scientific precision of prevention overlapping<sup>23</sup> but to include all possible legislative power within their ambit.<sup>24</sup>

2. Every attempt should be made to harmonize the different entries and to discard a construction which will render any of the entries nugatory or ineffective.<sup>25</sup>

#### Illustration.

Entry 3, List II of the Constitution deals with 'administration of justice, constitution of Courts', while Entry 65 of the same List relates to 'jurisdiction and powers of . . . Courts'. It was contended that since jurisdiction of Courts was specifically included in Entry 65, the State Legislature could claim no power to legislate with respect to jurisdiction under Entry 3, and that accordingly, the State Legislature had power relating to jurisdiction only in respect of matters coming within List II, as conferred by Entry 65. *Held*, rejecting the above contention, that the language of Entry 3 was wide enough to confer upon the State Legislature the right to regulate and provide for the whole machinery connected with the administration of justice. Legislation on the subject of administration of justice and constitution of Courts of justice would be *ineffective and incomplete* unless and until the Courts established under it were clothed with the jurisdiction and power to hear and decide causes. Hence, the two Entries read together, should be construed to mean that while Entry 3 of List II empowers the State Legislature to confer general jurisdiction on Courts, Entry 65 gives it to confer special jurisdiction with regard to the matters included in List II, while legislating with respect to those matters.<sup>27</sup>

#### Source of the taxing power.

The entries in the Legislative Lists are divided into two groups—one relating to the power to tax and the other relating to the power of general legislation relating to specified subjects. Taxation is considered as a *distinct matter* for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative Entry as an ancillary power.<sup>28</sup> Thus, the power to legislate on inter-State trade and commerce under Entry 42 of List I does not include a power to impose tax on sales in the course of such trade and commerce.<sup>29</sup>

18. *Govind v. State of U. P.*, A. 1952 All. 88.

19. *Sardara Singh v. Muslim Evacuee's Property*, A. 1952 Pepsu 12.

20. *I. T. Commr. v. Benoy*, A. 1957 S.C. 768 (773).

21. *Ramkrishna Dalmia v. Tendolkar*, A. 1958 S.C. 538.

22. *State of Bombay v. Narottamdas*, (1950-51) C.C. 292 (296-7, 298 301-2); (1951) S.C.R. 51.

23. *Sundaraman v. State of A. P.*, A. 1958 S.C. 468 (494).

**General Principles for interpretation of the Entries relating to the taxing power.**

(f) In order to determine whether a tax was within the legislative competence of the Legislature which imposed it, it is necessary to determine the nature of the tax, e.g., whether it is a tax on income, on property, business or the like, so that the Entry under which the legislative power has been assumed could be ascertained.

(a) The primary guide for this purpose is what is known as the '*charging section*'. The identification of the subject-matter of a tax is only to be found in the charging section,<sup>24</sup> i.e., the section which creates the liability to pay the tax, as distinguished from the mode of assessment or the machinery by which it is assessed.

(b) Generally speaking, all taxation is imposed on persons, but the nature and amount of liability is determined either by individual units, as in the case of a poll-tax, or in respect of the tax-payers's interest in property or in respect of transactions or actings of the tax-payers.<sup>25,1</sup>

But the 'incidence' or the ultimate burden of a tax does not determine its nature or alter the legislative power relating to it.<sup>2</sup>

(c) It is the substance of the levy and not the form that determines the nature of the tax. The name given by the Legislature is not conclusive for this purpose.

(d) The intrinsic character of a tax is not to be determined by the mode of measurement or the standard of calculation prescribed for assessing the amount of the tax.

Thus, in repelling the contention that a tax on 'buildings and lands' was not a tax 'on income' because the tax was leviable upon 'owners' and that the value of the building was taken as the basis for assessing the tax, the Federal Court observed<sup>24</sup>—

"It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profit or income. The annual value, as has been pointed out, is at best only *notional* or hypothetical income and not the actual income. It is only a *standard* used in the income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income."<sup>24</sup>

Similarly, the fact that the tax is to be measured in proportion to the fares and freights realised does not alter the nature of a tax upon 'goods and passengers' carried on motor vehicles.<sup>2</sup>

(e) If the power to impose a tax is established, the power to collect the same is necessarily implied.<sup>4</sup> The Legislature having the power to impose a tax has also the power to prescribe the means by which the tax shall be collected and to designate officers by whom it shall be enforced.

2. So far as the Entries relating to the taxing power are concerned,—"it is wrong to think that two independent imposts arising from two different acts of circumstances were not permitted" by the Constitution.<sup>5</sup> Thus, the same article may be subject to a Central

24. *Rala Ram v. Prov. of East Punjab*, A. 1949 F.C. 81.

25. *Byramji v. Prov. of Bombay*, I.L.R. (1940) Bom. 58.

1. *Mathural v. State of Madras*, (1954) 1 M.L.J. 110 (113).

2. *Amina v. I. T.O.*, A. 1954 Mad. 1120.

3. *Atma Ram v. State of Bihar*, A. 1952 Pat. 359 (364).

4. *Byramjee v. Prov. of Bombay*, I.L.R. (1940) Bom. 65 (76).

5. *Kishort v. The King*, (1949) F.C.R. 650.



excise duty and a State octroi duty;\* or a State tax as well as a Municipal tax.<sup>7</sup>

### The Doctrine of 'Pith and substance'.

1. This doctrine means that if an enactment *substantially* falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it, it cannot be held to be invalid, merely because it *incidentally* encroaches on matters assigned to another Legislature.<sup>8</sup> In other words, when a law is impugned as *ultra vires*, what has to be ascertained is the true character of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.<sup>9</sup>

#### Illustrations.

(i) Restriction of export may be necessary in order to secure the maintenance or increase of the supply of essential commodities or their availability at fair prices. Hence, while legislating under Entry 27 of List II ('production, distribution and supply of goods') the State Legislature is competent to control the export of such goods, even though 'export across customs frontiers' is a Union subject under Entry 41 of List I. Such a legislation would be covered by the State power, according to the doctrine of 'pith and substance'.<sup>10</sup>

(ii) The power to make laws in respect of money-lending<sup>11</sup> necessarily includes the power to affect the money-lender's rights with respect to promissory notes<sup>12</sup> given as security in money-lending transactions. Hence, a State law which is in its 'pith and substance' a law with respect to money-lending cannot be said to be *ultra vires* because of such incidental encroachment upon the Union power relating to promissory notes.<sup>13</sup>

(iii) In legislating under Entries 43 and 45 of List I, Parliament may provide for the determination of all claims arising in the winding up proceedings, including those relating to 'land' (Entry 18 of List II), e.g., whether the property liable to satisfy the debt due to a banking company is a private or ryoti land or occupancy or non-occupancy holding.<sup>14</sup>

2. In order to examine the true character of the enactment, one must have regard to the enactment as a whole, to its objects and to the scope and effect of the provisions. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *ultra vires* and what are not.<sup>15</sup>

3. The question of invasion into the territory of another Legislature is to be determined not by degree but by substance. Nevertheless the extent of invasion is not altogether irrelevant for the determina-

6. *Ramakrishna v. Municipal Committee*, (1950) S.C.R. 15 (25).

7. *Contentment Board v. Western India Theatres*, A. 1954 Bom. 261.

8. *State of Bombay v. Balsara*, (1950-51) C.C. 308 (312); (1951) S.C.R. 682.

9. *Krishna v. State of Madras*, A. 1957 S.C. 297 (303).

10. Entry 30, List II of the Constitution.

11. Entry 46 of List I of the Constitution.

12. *Prafulla v. Bank of Commerce*, A. 1947 P.C. 60.

13. *Thangla v. Hanuman*, A. 1958 Mad. 403 (410).

14. *Krishna v. State of Madras*, A. 1957 S.C. 297 (303).

tion of the question. Though the validity of an Act is not to be determined by discriminating between degrees of invasion, the extent of invasion into another sphere may itself determine what is the 'pith and substance' of the impugned Act.<sup>13</sup> But once the 'pith and substance' of the legislation is determined and is found to be within the powers of the Legislature, the extent of invasion into the other sphere cannot invalidate the law.<sup>14</sup>

3. The doctrine of 'pith and substance' is to be applied not only in cases of apparent conflict between the powers of two Legislatures but in any case where the question arises whether a legislation is covered by a particular legislative power in exercise of which it is purported to be made.

In all such cases, the name given by the Legislature to the impugned enactment is not conclusive on the question of its own competence to make it. It is the 'pith and substance' of the legislation which decides the matter,<sup>15</sup> and the pith and substance is to be determined with reference to the provisions of the statute itself.<sup>16</sup>

#### Illustration.

Resumption of a State jagir in exercise of the powers reserved by the grant would not be 'acquisition' within the meaning of Entry 36 of List II. No legislation is required for such resumption. But where a Legislature purported to acquire the rights of the jagirdar in exercise of its sovereign right of 'eminent domain' and on payment of compensation, the law was one of 'acquisition' of the interest of the Jagirdar, assuming that he had an interest in the jagir,—even though the Legislature itself labelled the enactment as one for 'resumption of jagirs'.<sup>17</sup>

#### Distinction between a 'Tax' and a 'Fee'.

1. The distinction between a 'tax' and a 'fee' is of particular importance under our Constitution in connection with the question of *vires* inasmuch as the power to levy different kinds of impositions has been distributed by the various Entries in the Legislative Lists, specifically, so that the validity of the imposition made by a particular Legislature has to be determined with reference to those Entries. Now, taxes are specifically divided between Lists I and II and the residuary power to levy a tax other than those enumerated in any of the Lists is given to Parliament, by Entry 97 of List I. Fees are, however, not mentioned specifically. There is a general Entry towards the end of each List which empowers the Legislature to levy a fee in respect of any matter over which it has legislative power according to the relevant List. The result is that the power of a Legislature to levy a fee or a tax is to be determined by applying different tests. [See pp. 509-510, ante].

2. Thus, in the following cases, a levy purported to be a fee, was held to be a 'tax' and, accordingly, *ultra vires* a State Legislature:

(i) A levy imposed on religious institutions<sup>18</sup> on the following grounds:

(a) It was levied according to the capacity of the payer and not according to the quantum of benefit received.

(b) On the other hand, there was a total absence of any co-relation between the expenses incurred by Government and the amount raised by the contribution.

15. *Chaturbhai v. Union of India*, A. 1960 S.C. 424 (429).

16. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (325).

17. *Commr. H. R. E. v. Lakshmindra*, A. 1954 S.C. 282.



(c) The amount collected by the levy was credited to the Consolidated Fund.

(ii) A levy imposed on religious institutions solely for the purpose of creating a surplus in the fund.<sup>18</sup>

### List I—Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces; any other armed forces of the Union.

<sup>13</sup>3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

#### 'Cantonments'.

The specific enumeration of subjects in the Entry shows that the Union Parliament shall have exclusive jurisdiction over cantonment areas, only in respect of the specified subjects, such as—

(i) delimitation; (ii) local self-government; (iii) constitution and powers of cantonment authorities; (iv) regulation of house accommodation, including control of rents.<sup>20</sup>

*Administration of justice*, which is a State subject under entry 3 of List II, includes administration of justice in cantonments just as in other areas of the State.<sup>19</sup>

'Regulation of house accommodation' would include requisitioning or acquisition of property or allocation of houses to individuals within a cantonment area.<sup>21</sup> But it would not include regulation of the relationship between landlord and tenant (*e.g.*, controlling eviction) which is a State power under Entry 18 of List II, extending over cantonment area as well.<sup>22,23</sup>

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

<sup>23</sup>8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.

18. *Sudhindra v. Commr.*, H. R. E., A. 1956 Mad. 491 (505).

19. In its application to the State of Jammu and Kashmir, the following shall be substituted for entry 3:—

"3. Administration of cantonments."

20. Cf. *United Provinces v. Governor-General*, A. 1939 F.C. 58 (69).

21. *Patel v. Viswanath*, A. 1954 Bom. 204.

22. *Kewalchand v. Dashrathlal*, A. 1956 Nag. 269 (272).

23. Not applicable to the State of Jammu and Kashmir.

**Preventive detention.**

Preventive detention for reasons other than those mentioned in the present Entry are included in Entry 3 of List III.

**'Connected with Foreign Affairs'.**

The expression is wide enough to cover the power to provide for the preventive detention of foreigners, for the purpose of making arrangements for their expulsion from India or for any other reason.<sup>24</sup>

**'Foreign affairs'.**

The Constitution (Declaration as to Foreign States) Order, 1950 declares that a Commonwealth country shall not be a 'Foreign State' for the purposes of this Constitution. But this Order cannot be brought into aid for interpreting the expression 'Foreign affairs' in entry 9, of List I of the Constitution or 'foreign powers' in s. 3 of the Preventive Detention Act, 1950. These latter expressions, therefore, would include Pakistan and it would be permissible to detain a person who is acting in a manner prejudicial to the relations of India with Pakistan.<sup>25</sup>

**'Security of the State'.**

As suggested by Art. 352, security of the State may be threatened either by external aggression or internal disturbance. What is meant by 'internal disturbance' is something more than an ordinary breach of the public peace, i.e., a rebellion or insurrection.<sup>1</sup>

10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

**Implementation of treaties and agreements.**

The Abducted Persons Recovery and Restoration Act, 1949, was enacted under item 3 of List I of the Government of India Act, 1935, which corresponded to the present Entry.<sup>2</sup>

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

**'Citizenship'.**

Part II of our Constitution (p. 4, ante) simply provides for acquisition of citizenship at the commencement of the Constitution. Art. 11 together with the present Entry empowers Parliament to legislate on the subject of citizenship.

24. *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1289).

25. *Jagannath v. Union of India*, A. 1960 S.C. 625 (628).

1. *Ram Nandan v. State*, A. 1959 All. 101 (110) F.B.

2. *Bimla v. Chaturvedi*, A. 1953 All. 614.



By virtue of the power conferred by this Entry, Parliament has enacted the Citizenship Act, 1955. This Act provides for the acquisition and termination of citizenship subsequent to the 26th January, 1950.

(A) *Acquisition of citizenship*.—Under this Act, citizenship can be acquired by—(a) birth; (b) descent; (c) registration; (d) naturalisation; (e) incorporation of territory.

(B) *Termination of citizenship*.—A citizen of India may lose his citizenship by—(i) renunciation; (ii) voluntarily acquiring the citizenship of another country; (iii) deprivation by order of the Central Government in the case of citizens by naturalisation or registration.

The Act also provides that every citizen of a 'Commonwealth country' shall have the status of a 'Commonwealth citizen' in India and the Central Government may, on the basis of reciprocity, confer on the citizens of a Commonwealth country all or any of the rights of a citizen of India [see p. 15, *ante*.].

#### 18. Extradition.

19. Admission into, and emigration and expulsion from, India ; passports and visas.

#### 'Expulsion from India'.

The power to provide for expulsion must be distinguished from the power to provide for extradition, which is separately mentioned in Entry 18. Extradition is, in essence, a special branch of the law of crimes, but in expulsion, no idea of punishment is necessarily involved.

Though a foreigner and a citizen are equally liable to be expelled from India under this power, in the case of a citizen, the law would be unconstitutional if it does not comply with the requirements of cl. (5), read with cl. (1) (e) of Art. 19.<sup>3,4</sup> But a foreigner is not entitled to the protection of Art. 19 and cannot, therefore, challenge the validity of an expulsion on the above ground.<sup>5</sup>

#### 20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air ; offences against the law of nations committed on land or the high seas or in the air.

#### 22. Railways.

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways as regards mechanically propelled vessels ; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters ; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

#### 'Shipping and navigation in national waterways'.

While Entry 24 of List I gives the Union Parliament exclusive jurisdiction in respect of shipping and navigation in those inland

3. *Hans Muller v. Supdt.* (1955) 1 S.C.R. 1285 (199).

4. *Ebrahim Vazir v. State of Bombay*, (1954) S.C.R. 933 : (1952-4) 2 C.C. 181.

water-ways which shall be declared by it to be 'national waterways'. Entry 32 of List III makes shipping and navigation in other inland waterways a concurrent subject. Both these Entries, however, are confined to shipping and navigation by '*mechanically propelled vessels*'. Navigation on inland waterways by means of any other kind of vessel, is a State subject under Entry 13 of List II.

Shipping and navigation on 'tidal waters', on the other hand, is an exclusive Union subject. (Entry 25, List I).

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

**'Major ports'.**

This Entry gives to the Union only a limited power as regards ports—(a) It is confined to 'major ports' (see Art. 364); (b) It is restricted to the specified matters only, viz., 'delimitation, constitution and powers of port authorities therein'.

Other ports will come within Entry 31 of List III.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

**'Carriage by railway, sea or air'.**

This Entry deals with carriage of passengers and goods by railway, sea or air, or by national waterways by '*mechanically propelled vessels*'.

Carriage of passengers and goods by roads comes under the State List [Entry 19, List II]; while carriage by inland waterways comes within the Concurrent List [Entry 32, List III].

'Mechanically propelled vessels' themselves come under Entry 35 of List III.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

**'Other like forms of communication'.**—Under this Entry would come the control of manufacture and licensing of sound amplifiers but not the control of their use in the interests of health and tranquillity, which would fall under Entries 1 and 6 of List II.<sup>5</sup>

32. Property of the Union and revenue therefrom, but as regards property situated in a State . . . .<sup>5a</sup> subject to legislation by the State, save in so far as Parliament by law otherwise provides.

5. *State of Rajasthan v. Chawla*, A. 1959 S.C. 544 (546).

5a. Omitted by the Constitution (Seventh Amendment) Act, 1956.



33. \* \* \*

34. Courts of wards for the estates of Rulers of Indian States.

35. Public debt of the Union.

36. Currency, coinage and legal tender ; foreign exchange.

#### 'Foreign Exchange'.

This power includes not only the power to *control* foreign exchange but also to *acquire* it for the betterment of the economic stability of the country.

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

40. Lotteries organised by the Government of India or the Government of a State.

#### Lotteries.

Lotteries organised by Government come under the present Entry ; all other lotteries will come under the general Entry 34 (betting and gambling) in List II.\*

41. Trade and commerce with foreign countries ; import and export across customs frontiers ; definition of customs frontiers.

42. Inter-State trade and commerce.

#### Distribution of legislative power with respect to Trade and Commerce.

While foreign trade and commerce is dealt with in Entry 41 of List I, the legislative power as regards trade and commerce within a State or between different States of India, are dealt with in 3 other Entries of the 7th Schedule.

Entry 42 of List I, is—"Inter-State trade and commerce".

Entry 26 of List II,—"*Trade and commerce within the State, subject to the provisions of Entry 33 of List II*".

Entry 33 of List III, is—"Trade and commerce in, and the production, supply and distribution of, the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest . . ."

Since the three entries are to be read together, and under Art. 246, the State and Concurrent powers are to be read subject to the exclusive power of Parliament with respect to any matter of List I, it follows that when a matter is *with respect* to 'inter-State trade and commerce', the jurisdiction of Parliament is exclusive, irrespective of any other question. When the matter is with respect to 'trade and commerce' *within* the State, the State Legislature has exclusive power, subject, however, to the power of Parliament with respect to inter-State trade and commerce [*vide* Art. 246 (3)]. But even when the matter is with respect to trade and commerce within the State, but the trade and commerce relates to the products of industries the control of which by the Union has been declared by Parliament to be

6. Omitted by the Constitution (Seventh Amendment) Act, 1956.

7. *Krishna Sugar Mills v. Union of India*, A. 1959 S.C. 1124.

8. *State of Bombay v. Chamarbagwalla*, A. 1956 Bom. 1 (6).

expedient in the public interest, the legislative power shall be *concurrent*. The power of Parliament to declare industries to be of the above nature is conferred by Entry 52 of List I. The Constitution (Third Amendment) Act has widened the scope of Entry 33 by including imported goods of the same kind as products which are declared under Entry 52 of List I, as well as certain other specified commodities, such as foodstuffs (see, further, under Entry 33, *post*.)

In short, the power of the State Legislature under Entry 26 of List II is subject to the powers conferred by Entry 42 of List I and 23 of List III.

### Scope of Entry 42.

This Entry confers general legislative power relating to "inter-State trade and commerce". The power to tax inter-State sales is not included in this Entry. That power belongs to the State Legislature under Entry 54 of List II, subject to Art. 286.<sup>9</sup>

<sup>10</sup>43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

### 'Incorporation, regulation and winding up of trading corporations'.

1. An Act which regulates the affairs of a company by laying down certain special rules for its management and administration is fully covered by this item.<sup>11</sup> It would also include legislation providing for the amalgamation of companies,<sup>12</sup> but not the regulation of their functions.

2. Read with Entry 95 of List I, the present Entry empowers Parliament to define the jurisdiction of Courts (other than the Supreme Court) relating to the subject-matters coming under the present Entry, e.g., banking companies.<sup>13</sup>

<sup>14</sup>44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

### 45. Banking.

#### 'Banking'.

It would be too much to say that every law which in its operation might affect the property or interest of a Bank *just as it affects the property or interest of other persons* would constitute an encroachment on the present Entry. But a law which solely affects the amounts recoverable by Banks in execution of decrees obtained by them would encroach upon the present Entry.<sup>15</sup>

46. Bills of exchange, cheques, promissory notes and other like instruments.

9. *Sundaramier v. State of A. P.*, A. 1958 S.C. 468 (494).

10. In its application to the State of Jammu and Kashmir, the words "trading corporations, including" shall be omitted.

11. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

12. *Narayanprasad v. Iron & Steel Co.*, A. 1953 Cal. 695.

13. *Hanuman Bank v. Munia*, A. 1958 Mad. 279.

14. Not applicable to the State of Jammu and Kashmir.

15. *Bank of Commerce v. Kunja Behari*, A. 1944 Cal. 196.



**'Other like instruments'.**

This phrase means 'instruments of the same genus as cheques, bills of exchange and promissory notes'. *Negotiability* is the common essential attribute of all instruments coming under the present Entry.<sup>16</sup> Other aspects of these instruments, e.g., *interest* on promissory notes, do not come under this Entry.<sup>17</sup>

47. Insurance.

48. Stock exchanges and futures markets.

*Acts coming under this Entry.*—Forward Contracts (Regulation) Act, 1952.<sup>18</sup>

49. Patents, inventions and designs; copyright; trade marks and merchandise marks.

<sup>17</sup>50. Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

<sup>17</sup>52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

**'Industry'.**

In the present context, industry means the process of manufacture or production and does not include the raw materials used in the industry, or in distribution of the products of the industry.<sup>19</sup>

**Production, supply and distribution.**

While the general power as to production, supply and distribution of goods is included in Entry 27 of List II, the production, supply and distribution of goods produced by industries declared under the present Entry comes under Entry 33 (a) of List III.<sup>20</sup> But Entry 33 (a) is concerned only with 'products', so that raw products used in the industrial process come under Entry 27 of List II, even though the industry is a controlled industry under Entry 52 of List I.<sup>21</sup>

**'Taxation'.**

A tax on the entry of raw materials into a factory premises is a tax under Entry 52 of List II, and the State is not debarred, from levying it by reason of the present Entry.<sup>22</sup>

<sup>21</sup>53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

16. *Bank of Commerce v. Nripendra*, A. 1945 F.C. 7.

17. Not applicable to the State of Jammu and Kashmir.

18. *Raymon & Co. v. Waverley Jute Mills*, A. 1959 Cal. 89.

19. *Tika Ramji v. State of U. P.*, ('956) S.C.R. 393 (411, 420).

20. *Murl v. State of U. P.*, A. 1957 All. 159 (164).

21. In its application to the State of Jammu and Kashmir, for entry 53, the following shall be substituted:—

<sup>21</sup>53. Petroleum and Petroleum Products, but excluding the regulation and development of oilfields and mineral oil resources; other liquids and substances declared by Parliament by law to be dangerously inflammable".

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

**Entries 54 of List I and 23 of List II.**

To the extent that there is no declaration by Parliament in exercise of the power conferred by the present Entry, the power of 'regulation of mines and mineral development' belongs to the State Legislature, under Entry 23 of List II.<sup>22</sup>

**'Regulation'.**

The Calcutta High Court has held<sup>23</sup> that the word 'regulation' as such would not authorise the imposition of a tax.<sup>24</sup>

<sup>23-25</sup>55. Regulation of labour and safety in mines and oilfields.

**Labour in mines and coalfields.**

The general power relating to 'welfare of labour' is concurrent, under Entry 24 of List III and the present Entry is in the nature of an exception to that general power.

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

**Fisheries.**

"Fisheries" is an exclusive State subject under entry 21 of List II, while "fisheries beyond territorial waters" is an exclusive Union subject under Entry 57 of List I. The State Legislature has thus exclusive competence over fisheries situated within the territory of its State, including those within its adjoining territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies ; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

**Opium.**

While the present entry gives the Union exclusive control over only cultivation, manufacture and sale for export,—duties of excise on the production of opium is a State subject under Entry 51 of List II.

<sup>23-25</sup>60. Sanctioning of cinematograph films for exhibition.

22. *Aluminium Corp. v. Coal Board*, A. 1959 Cal. 222 (225).

[But the bearing of Entry 97 of List I was not considered in this context. The actual imposition in the case was held to come under Entry 84 of List I].

23-25. Not applicable to the State of Jammu and Kashmir.



**'Sanctioning of cinematograph films for exhibition'.**

This Entry relates to only one particular aspect of cinematography, *viz.* the *sanctioning* of films for exhibition. All other matters relating to cinemas is included in Entry 33 of List II, including regulation of *storage* of films or licensing of storages.<sup>1</sup>

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

- (a) professional, vocational or technical training, including the training of police officers ; or
- (b) the promotion of special studies or research ; or
- (c) Scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

**Standards for higher education.**

While 'education' is a State subject (Entry 11, List II), Entries 65 and 66 give the Union power to secure that the standard of research, etc., is not lowered at the hands of any particular State or States, to the detriment of national progress.

<sup>2</sup>67. Ancient and historical monuments and records, and archaeological sites and remains, *declared by or under law made by*<sup>3</sup> Parliament to be of national importance.

**Amendments.**—The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante*.

1. *De Luxe Film Exhibitors v. Corporation of Calcutta*, 7 D.L.R. 144 (Cal.).

2. In its application to the State of Jammu and Kashmir, the words 'and records' shall be omitted.

3. Inserted by the Constitution (Seventh Amendment) Act, 1956.

**Ancient monuments.**

Ancient monuments other than those which are declared to be of national importance are included in Entry 12 of List II, while archaeological sites, other than those declared by Parliament to be of national importance, are included in Entry 40 of List III.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India ; Meteorological organisations.

<sup>2</sup>69. Census.

70. Union public services ; all-India services ; Union Public Service Commission.

**Entries 70 of List I and 41 of List II.**

These two Entries give the legislative power to legislate with respect to conditions of service, which is referred to in Art. 309.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

<sup>4</sup>72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President ; the Election Commission.

**Election to Parliament and State Legislatures.**

1. Read with Entry 93 of List I, the present Entry gives power to Parliament to legislate with respect to election offences relating to elections to Parliament and the State Legislatures,<sup>4</sup> even though some aspects of the offences created may relate to 'public order',<sup>5</sup> to provide for maintenance of public order during elections.<sup>6</sup>

2. The power to legislate with respect to—

"Elections to the Legislature of the State subject to the provisions of any law made by Parliament"

belongs to the State Legislature under Entry 37 of List II. The result is that the State Legislature has also the power to enact laws relating to elections to the State Legislature, so long as Parliament does not legislate *to the contrary*. Or, in other words, in case of repugnancy, the Union law will prevail even though it relates to election to the State Legislature.

3. By virtue of this Entry, an Election Tribunal set up under the Representation of the People Act, which is a Union law, has jurisdiction to try an election petition calling in question an election to the State Legislature.<sup>7</sup>

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House ; enforcement of attendance of persons for giving

4. Not applicable to the State Jammu and Kashmir.

5. *Nagendra v. The State*, A. 1954 Pat. 356.

6. *Rameshwar v. State*, A. 1957 Pat. 252 (255).

7. *Murlidhar v. Kadom*, A. 1954 M.B. 111.



evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

#### 'Constitution and jurisdiction of Courts'.

(a) The jurisdiction and powers of Courts is dealt with by several Entries:

Entry 77, List I: Of the Supreme Court, relating to any matter.

Entry 95, List I: Of all Courts other than the Supreme Court, relating to any matter in List I.

Entry 65, List II: Of all Courts other than the Supreme Court, relating to any matter in List II.

Entry 56, List III: Of all Courts except the Supreme Court, relating to any matter in List III.

(b) The Constitution of Courts, again, is dealt with in the following Entries—

Entry 77, List I: Of the Supreme Court.

Entry 78, List I: Of the High Courts.

Entry 3, List II: Of all Courts, except the Supreme Court and the High Courts.

<sup>1</sup>78. Constitution and organisation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.

#### 'Union's Control over High Courts'.

By the present Entry, the Union is given exclusive power over the constitution and organisation of the High Courts. By Arts. 216-7, the power of appointment of the High Court Judges has been vested in the President. The power over constitution of the High Courts is given to Parliament for the sake of uniformity.

Again, legal profession is a concurrent subject [Entry 26, List III]. But the Union is given, by the present Entry, the exclusive power of prescribing the qualifications for practising before the High Courts.

Entries 77 and 78 of List I are in the nature of exceptions to the general power conferred by Entry 26 of List III.<sup>2</sup>

#### 'Constitution and organisation of High Courts'.

1. This Entry does not include an arrangement to deal with a class of cases, e.g., to provide that all appeals shall be heard by not

8. Not applicable to the State of Jammu and Kashmir.

9. *Durgeshwar v. Bar Council*, A. 1954 All. 728 (733).

less than two Judges. This is a matter which appropriately comes under 'administration of justice' in Entry 3 of List II.<sup>10</sup>

2. The present Entry does not include any power relating to jurisdiction of the High Court.<sup>11</sup> [See under Entry 95 of List I and Entry 3 of List II, *post*].

### 'Practice'.

This word includes the functions of both acting and pleading on behalf of a suitor.<sup>12</sup>

By reason of the present Entry, a State Legislature has no power to amend the Bar Councils Act.<sup>13</sup>

<sup>13</sup>79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

<sup>14</sup>81. Inter-State migration; inter-State quarantine.

### Inter-State migration.

By reason of this Entry, it is not within the competence of a State Legislature to legislate relating to refugees from one State within the territory of India to another.<sup>15</sup>

82. Taxes on income other than agricultural income.

### 'Taxes on income'.

1. Entry 82 of List I is, however, a head of legislative power which should not be interpreted in any restricted sense either with reference to anything in the Indian Income-Tax Act or in the English or American law relating to income-tax.<sup>16</sup> Since there is no definition of the word 'income' in the Constitution itself, the word is to be interpreted according to its natural and grammatical meaning which means 'a thing that comes in' and is thus a word of the 'broadest connotation'.<sup>17</sup>

2. It would, thus, embrace any profit or gain which is actually received.<sup>18</sup> Hence, a tax on 'capital gains' (e.g., the sale proceeds of certain properties which formed the capital of a business concern) is *intra vires* Entry 82 of List I.<sup>19</sup> Again, it would include not only income which has actually accrued but also income which is supposed by the Legislature to have notionally accrued.<sup>20</sup>

10. *Siddamma v. Nanje*, A. 1952 Mys. 75.

11. *Amarendra v. Bikash*, A. 1957 Cal. 534 (543).

12. *Aswini v. Arabindo*, (1952) S.C.J. 568 (573).

13. Changes made by the Constitution (Seventh Amendment) Act, 1956.

14. In its application to the State of Jammu and Kashmir, in item 81, the words "inter-State quarantine" shall be omitted.

15. *Cf. Sanvaldas v. State of Bombay*, A. 1953 Bom. 415.

16. *Navinchandra v. Commr. of I. T.*, A. 1955 S.C. 58 (61).

17. *Kamakhya v. Commr. of I. T.*, A. 1943 P.C. 153.

18. *Commr. of I. T. v. Bhaglal*, A. 1954 S.C. 155.



3. Taxes on the income from trade or profession (Entry 60, List II) is excluded from the scope of the present Entry, by Art. 276 (*ante*).

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

#### 'Duty of excise'.

1. A duty of excise is primarily levied upon a manufacturer or producer in respect of the commodity *manufactured or produced*. It is a tax upon *goods*, not upon sales or the proceeds of sale of goods.<sup>19</sup>

2. Nor does it include a tax on raw materials which are *subsequently* required in the process of manufacture.<sup>20</sup> It is also to be distinguished from a tax on the transportation of goods.<sup>21</sup>

3. But if a tax is imposed on the manufacturer or producer, it does not cease to be an excise duty simply because it is collected at the stage of issue of the products out of the mills;<sup>22</sup> or because the duty on coal produced in a mine is computed on the tonnage of the coal *despatched* from the mine.<sup>23</sup>

4. An excise duty is levied on the manufacture or production of the goods, irrespective of the fact as to how or by whom it is consumed and even though the producer consumes it himself.<sup>24</sup>

#### Excise duty and customs.

Excise differs from customs [Entry 83, List I] in that excise is a tax on articles produced or manufactured *in* the taxing country and intended for *home consumption*, while customs is a tax on consumption outside the taxing State or on home consumption of goods imported from abroad.

#### Excise duty and sales tax.

1. While a duty of excise is levied upon a manufacturer in respect of the goods *manufactured*, a sales tax (Entry 54, List II) is levied upon a vendor in respect of his *sales*. There is no overlapping between the two imposts, and while Parliament may impose a duty of excise on excisable goods under the present Entry, the State Legislature may impose a tax upon the sale of the same goods.<sup>25</sup>

2. A tax on the first sale effected by a manufacturer or producer is a sales tax and not an excise duty.<sup>1</sup>

19. *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.), affirming *Province of Madras v. Boddu Paidanna*, A. 1942 F.C. 33.

20. *Murl v. State of U. P.*, A. 1957 All. 159 (164).

21. *H. P. Barua v. State of Assam*, A. 1955 Assam 249.

22. *Bihar Cotton Mills v. Union of India*, A. 1957 Pat. 131.

23. *Aluminium Corpn. v. Coal Board*, A. Cal. 222 (227).

24. *In re C. P. Motor Spirit Act*, A. 1930 P.C. 1.

25. *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.), affirming *Province of Madras v. Boddu Paidanna*, A. 1942 P.C. 33.

1. *Ram Raj Trading Co. v. Asstt. Commercial Tax Officer*, A. 1957 Mad. 325.

3. Where a tax is imposed on the sale, it does not become an excise duty merely because the State Legislature lays down the place of manufacture to be regarded as the *silus* of the sale.<sup>2</sup>

'Goods'.—See under Art. 306 (12), *ante*.

'Manufactured or produced'.

The word 'produced' has been used in juxtaposition to the word 'manufactured'. While 'manufacture' refers to the turning out of a raw material into something altogether different from the material, the word 'produced' refers to the application of human skill or labour in some form to make a material, even though it be a natural product such as coal, so that it may be fit for human consumption.<sup>3</sup>

**Incidental and ancillary matters.**

A legislation, which in its 'pith and substance', is one for the levy of an excise duty on tobacco does not cease to be under the present entry, merely because it provides for ancillary matters to make the legislation effective, e.g., the licensing of the manufacture, sale or storage of the excisable goods [Entries 26-27 of List II], including the imposition of a licence fee.<sup>4</sup>

85. Corporation tax.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

'Individuals'.—This word includes an association of individuals such as a Hindu undivided family.<sup>5</sup>

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

**Estate Duty and Succession Duty.**

1. There are real and substantial differences between Succession Duty and Estate Duty. There is one feature common to both taxes, *viz.*, that the occasion for the levy is the death of a person; but while Succession Duty [Entry 88 of List I] has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other consideration relevant from that point of view,—the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it.<sup>6</sup>

While a succession duty falls upon the person who takes the property of the deceased, an estate duty falls upon the property whoever may be the successor to the property on the death of the previous owner.<sup>6</sup>

2. *Tata Iron & Steel Co. v. State of Bihar*, A. 1968 S.C. 453 (459).

3. *Aluminium Corp. v. Coal Board*, A. 1959 Cal. 222 (226).

4. *Chaturbhai v. Union of India*, A. 1960 S.C. 424 (429).

5. *Mahavirprasad v. Yajnik*, (1959) 61 Bom. L.R. 1433.

6. In the matter of *Duty on Non-agricultural Property*, A. 1944 P.C. 73.



2. Since the word 'succession' implies the passing of property on the death of a person to another,<sup>7</sup> a tax on a gift *inter vivos* would not come under the present Entry.<sup>8</sup>

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

**'Terminal tax'.**

1. While the present Entry gives to the Union the power to levy terminal taxes on goods or passengers carried by railway, sea or air, Entry 52 of List II gives to the State the power to levy taxes on the entry of goods into a local area for consumption, use or sale therein.

Entry 56 of List II, on the other hand, empowers the State to impose taxes on goods and passengers carried by road or on inland waterways.

2. The terminal tax in List I must be—(a) terminal; (b) confined to goods and passengers carried by railway, sea or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation.<sup>9</sup> Another point of difference between the two Entries is that while under the present Entry, a terminal tax may be levied on goods and passengers while entering as well as leaving an area, the power of the State under Entry 52 of List II is confined to goods and only when the goods enter into a local area and for particular purposes, *viz.*, consumption, use or sale in that area. [See further under Entry 52, List II].

3. The requirements of a tax under Entry 52 of List II, on the other hand, are—(a) the entry of goods into a definite area and (b) the entry must be for the purpose of consumption, use or sale of the goods in such local area.<sup>1</sup> There is no limitation to be implied in this Entry, in regard to the manner in which goods may be transported into a local area.<sup>2</sup>

4. It follows that so far as rail-borne goods are concerned the same goods may well be subjected to taxation under Entry 59 of List I and Entry 52 of List II. The grounds of taxation under the two Entries are radically different.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

**Taxes on sale of newspapers.**

Taxes on sale of goods and on advertisements are included in Entries 54-5 of List II, but taxes on sale of newspapers and on newspaper advertisements are excluded from those entries and included in the present Entry.

7. *Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 115 (119).

8. *Punjab Flour Mills v. Corp. of Lahore*, (1947) F.C.R. 17.

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

**Amendment.**—This Entry has been inserted by the Constitution (Sixth Amendment) Act, 1956.

See p. 517 *ante*.

93. Offences against laws with respect to any of the matters in this List.

**'Offences with respect to matters in List I'.**

The Union Legislature has exclusive power to create offences in respect of insurance, under the present Entry.<sup>9</sup>

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

**'Inquiry'.**

An inquiry necessarily involves investigation into facts and collection of material facts from the evidence brought to the notice of the person or body making the inquiry and also includes ancillary matters, *e.g.*,

(i) the recording of the findings of the inquiring body on the facts;

(ii) the views of the inquiring body on the facts found, for the consideration of the Government which set up the inquiry, with recommendations for the suppression of the mischief in future.

It, cannot, however, include any recommendation as to the award of punishment for wrongs *already done or committed*, for, that is a function which can be exercised only by a court of law properly constituted and not by an 'inquiring body'. A law made under the present Entry or under Entry 45 of List III cannot, accordingly, empower the inquiring authority to suggest the action necessary by way of securing 'redress or punishment' for wrongs already committed.<sup>10</sup>

**'For the purpose of . . . List'.**

This Entry authorises Parliament to make a law for making inquiry into any matter relating to any subject which is enumerated in List I. The purpose of the inquiry may be administrative or otherwise and is not confined to the undertaking of some future legislation.<sup>11</sup> The law made under the present Entry may cover inquiries into any aspect of the matters enumerated in the List and is not confined to those matters as mere heads of legislative topic.<sup>12</sup>

*Acts coming under the present Entry.*—Commissions of Inquiry Act, 1952.<sup>13</sup>

95. Jurisdiction and powers of all courts, except the Spureme Court, with respect to any of the matters in this List ; admiralty jurisdiction.

**Entry 95 of List I and Entry 65 of List II.**

The effect of these entries is that while legislating with regard to matters in their respective legislative lists, the two Legislatures are competent to make provisions in the several Acts enacted by them,

9. *Raghubar v. Emp.*, A. 1944 F.C. 25.

10. *Ramkrishna Dalmia v. Tendolkar*, (1958) S.C.A. 754 (769).



concerning the jurisdiction and powers of Courts in regard to the subject-matter of the Acts, because otherwise the legislation may not be quite complete or effective. These entries are wide enough to empower the two Legislatures to legislate negatively as well as affirmatively, with regard to the jurisdiction of the Courts in regard to the matters within their respective legislative ambits. They can bar the jurisdiction of the Courts in regard to those matters and they can also confer special jurisdiction on certain Courts.<sup>11</sup> (See further under Entry 3, List II).<sup>12</sup>

*Acts coming under this Entry.*—Ss. 45A-B of the Banking Companies Act, 1949<sup>13</sup>

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

#### 'Fees'.

1. In order to come under the present Entry or under Entry 66 of List II or Entry 47 of List III, the levy must be a 'fee' as distinguished from a tax or other impost (see pp. 508-9 *ante*), for, the different imposts are distributed between the Union and the States by different entries, on different principles. Thus, where no expenses are incurred at all for rendering an alleged service, the imposition of a fee would be *ultra vires*, if the imposition is purported to be made under an Entry relating to 'Fees'.<sup>14</sup>

2. This Entry authorises the imposition of a licence fee where licensing can be legitimately resorted to as ancillary to the taxing power.<sup>15</sup>

#### 'Not including fees taken in any court'.

Fees taken in all Courts other than the Supreme Court is included in Entry 3 of List II. But if the tribunal or authority in relation to which the fee is taken be not a 'court' and the matter is included in any Entry of List I, it is within the competence of Parliament to levy a fee. Thus, Parliament may impose a fee for appeal to the Appellate Tribunal under the Income-Tax Act, for the Appellate Tribunal is not a 'Court' and taxation of non-agricultural income is enumerated in Entry 82 of List I.<sup>16</sup>

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

**Construction of the residual power.** See under Art. 248, *ante*.

#### Laws covered by the residuary Entry.

The following have been held to be covered by the present Entry.—

A gift tax on gifts of movable and immovable property, including land.<sup>17</sup>

11. *State of Bombay v. Narottamdas*, A. 1951 S.C. 69 (71, Fazl Ali J.).

12. *Thangia v. Hanuman Bank*, A. 1958 Mad. 403 (410).

13. *Raj Kishore v. Dt. Board*, A. 1954 All. 675 (679).

14. *Guruviah v. State of Madras*, A. 1958 Mad. 158 (169).

15. *Cf. Seshadri v. I. T. Officer*, A. 1954 Mad. 806 (808).

16. *Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 115.

List II—State List.<sup>1</sup>

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

## 'Public Order'.

1. 'Public Order' is a most comprehensive term and subject to the exception mentioned, viz., use of the armed forces in aid of the civil power, the State Legislature is given plenary authority to legislate on all matters which relate to or are necessary for the maintenance of public order.<sup>2</sup> [See also under Entry 9, List].

2. Public order implies absence of violence and an orderly state of affairs, in which citizens can peacefully pursue their normal avocation of life.<sup>3</sup> Anything which disturbs public tranquillity disturbs 'public order'.<sup>4</sup> This entry also includes 'public safety' in its relation to the maintenance of public order.<sup>5</sup> In short, 'public order' is synonymous with public peace, safety and tranquillity,<sup>6</sup> and would, therefore, cover legislation to regulate the use of sound amplifiers.<sup>7</sup>

3. It is to be carefully noted in this connection that while the ambit of the expression 'public order' is very wide, the qualifying expression 'reasonable restriction' in Art. 19 (2) or 'for reasons connected with' in Entry 3 of List III restrict the ambit of legislative power under those provisions; for, those expressions require that the connection between the legislation under those provisions and 'public order' must be "real and proximate, not far-fetched and problematic".<sup>8</sup> Under the latter provisions it has been held that—

(a) Blackmarketing;<sup>9</sup>

(b) Contempt of Court;<sup>10</sup>

(c) Incitement not to pay taxes or other Government dues, unless the restriction is exclusively aimed at a general campaign for non-payment;<sup>11</sup>

(d) Holding of meetings and processions when there is no allegation for violence;<sup>12</sup>

cannot be penalised by the Legislature 'in the interests of' or 'for reasons connected with' public order.

The decisions under those provisions should not be imported to restrict the meaning of 'public order' under Entry 1 of List II in cases where the question is one of legislative competence, which is governed by the expression 'with respect to' (see p. 474, ante).

The power to legislate relating to offences relating to matters specified in Lists I and II.

Entries 93 of List I and 64 of List II confer specific power on the respective Legislatures to legislate with respect to 'offences against laws

1. List II is not applicable to the State of Jammu and Kashmir.
2. *Lakhinarayan v. Province of Bihar*, (1949) 5 D.L.R. 17 (22) F.C.
3. *Basudev v. Rex*, (1949) D.L.R. 188 All. (F.B.).
4. *Ramesh Thappar v. State of Madras*, (1950) S.C.J. 418 (421).
5. *Nek Mohammad v. Prov. of Bihar*, A. 1949 Pat. 1 (F.B.); *Emp. v. Sibnath*, A. 1943 F.C. 1.
6. *Superintendent v. Ram Manohar*, A. 1960 S.C. 633 (639).
7. *State of Rajasthan v. Chawla*, A. 1959 S.C. 544 (547).
8. *Supdt., Central Prison v. Ram Manohar*, A. 1960 S.C. 633 (639).
9. *R. v. Basudeva*, A. 1950 F.C. 67 (69).
10. *Sodhi Shamsar v. State of Pepsu*, A. 1954 S.C. 276.
11. *Umraomal v. State of Rajasthan*, A. 1955 Raj. 6 (10).



with respect to any of the matters' specified in those Lists. The general power conferred by Entry 1 of List II must, therefore, be read subject to the above specific powers. For instance, Parliament shall be competent to make a law relating to 'election offences' even though certain aspects of the offences so created may relate to 'public order'.<sup>12</sup>

## 2. Police, including railway and village police.

### 'Police'.

The word is wide enough to empower the State Legislature to create an armed constabulary.<sup>13</sup>

3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.

### 'Administration of justice : constitution and organisation of Courts'.

1. This expression is wide enough to include the power to confer jurisdiction (both civil and criminal) upon the Courts set up by the State Legislature under the present Entry.

2. While Entry 95 of List I, Entry 65 of List II and Entry 46 of List III of the Constitution confer power in the respective Legislatures to invest the Courts with *special* jurisdiction relating to particular subjects included in those Lists, when the Legislature was dealing with those subjects, item 3 of List II confers power upon the State Legislature to invest the Courts with *general* jurisdiction to try all causes of a civil nature, subject to the power of the Central and State Legislatures to make 'special provisions' relating to the particular subjects included in their respective legislative lists.<sup>14</sup>

### Illustration.

The Bombay City Civil Courts Act, 1948, purports to create an additional Civil Court for Greater Bombay having jurisdiction to try all suits and proceedings of a civil nature not exceeding ten thousand rupees in value. It was contended that the Act was *ultra vires* the Legislature of Bombay because it conferred jurisdiction on the new Court not only in respect to matters on which the Provincial Legislature is competent to legislate but also in respect of matters included in List I regarding which only the Central Legislature could legislate. *Held*, the Act was within the power of the Provincial Legislature with respect to 'administration of justice, constitution of all Courts. . . . ' (cf. Entry 3 of List II of the Constitution), which empowers the Provincial Legislature to confer *general* jurisdiction upon the Courts relating to matters included in all the Lists, subject to special legislation by the respective Legislatures within their own fields.<sup>14</sup>

3. In exercise of this power relating to jurisdiction of Courts, the State Legislature is competent to legislate with regard to the jurisdiction of Courts, both affirmatively as well as negatively. In other words it can not only confer jurisdiction upon the Courts, but also bar jurisdiction upon any matter or take away existing jurisdiction from them.

12. Cf. *Nagendra v. State*, A. 1954 Pat. 356 (357).

13. *Shantanand v. Adv. General*, A. 1955 All. 370 (372).

14. *State of Bombay v. Narottamdas*, (1954) S.C.R. 51 : (1950-51) C.C. 292 (296-7; 299).

This power must include the power of defining, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily.<sup>15,16</sup> It is, of course, open to the Union Legislature to bar the jurisdiction of the new Court by a special enactment with regard to any of the matters in List I, but so long as such jurisdiction is not barred, the Court will have jurisdiction to try all suits and proceedings, including those which relate to matters within List I.<sup>17</sup>

#### *Illustrations.*

(i) The Union Parliament has, under Entry 63 of List I, the power to legislate with respect to the Universities specified in that Entry. Hence, Parliament may enact that suits in which these Universities are concerned shall be tried only by particular Courts mentioned in that enactment; but until such an enactment is made by Parliament, a Court (established under Entry 3 of List II), which would otherwise be the proper Court to try a suit relating to the University, shall have jurisdiction to try such suit. In short, in the absence of special legislation, the Civil Court, having jurisdiction under s. 9 of the Civil Procedure Code, shall have jurisdiction to try any matter arising under any subject specified in the three Lists as the case may be.<sup>18</sup>

(ii) Entry 30 of List I deals with "carriage of passengers and goods. . . . ." Now, if any of the goods carried by a carrier is lost and a suit is brought in regard to them, the suit will be triable by the Court having jurisdiction over the matter under the Civil Procedure Code, subject to any special legislation on the subject by the Union Legislature, notwithstanding the fact that 'carriage of goods' is a subject mentioned in List I.<sup>19</sup>

4. Under the present Entry, read with Entry 65 of List II, the State Legislature has to legislate with respect to the jurisdiction of the State High Court except in so far as it is excluded by Entry 95 of List I,<sup>20</sup> and to invest a new Court with a part of the jurisdiction then existing in the High Court.<sup>21</sup>

5. The present Entry includes the power to provide for an arrangement to deal with a class of cases, e.g., to provide that all appeals in the High Court shall be heard by not less than two judges.<sup>22</sup>

6. Read with Entry 3 of List III, it gives the State Legislature the power to legislate as to the enforcement of foreign judgments.<sup>23</sup>

#### **'Constitution of Courts'.**

Barring the Supreme Court and High Courts [*see* Entries 77-8, List I], the constitution of all Courts is a Provincial subject. The Indian Constitution thus follows the Canadian example and differs from that of the American system by avoiding a dual hierarchy of Courts—Federal and State. It is the State Courts which are to administer both Federal and State laws; and administration of justice as a whole [subject to Entries 77-9 of List I and 46 of List III] is made a State subject. Of course, Parliament has the power to create additional Courts for the better administration of particular Union Laws [Art. 247].

15. *State of Bombay v. Narottamdas*, A. 1951 S.C. 69 (72), Fazl Ali J.

16. *Kumaraswami v. Premier Electric Co.*, A. 1959 A.P. 3; *Amarendra v. Bikash*, A. 1957 Cal. 534 (544).

17. *Ahmed v. Inspector*, A. 1959 Mad. 261 (268).

18. *Siddamma v. Nanje*, A. 1952 Mys. 75.

19. *Gauri Lal v. Jugal*, A. 1959 Panj. 265 (269) P.B.



**'Fees taken in Courts'.**

The present power does not extend to any tribunal which is not a 'Court' in the proper sense of the term, though it may possess many of the trappings of a Court, e.g., an Income-Tax Appellate Tribunal,<sup>20</sup> an Assistant Collector or a Revenue Commissioner under a Sales Tax Act.<sup>21</sup> But it enables the State Legislature to prescribe fees charged in the High Court.<sup>22</sup>

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons, detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

**'Local Government'.**

1. The Entry is very wide and empowers the State Legislature to legislate with respect to any subject relating to local government. It can also confer such powers as it itself possesses, upon a local authority, including the power of taxation (within the limits of List II), for the purposes of local self-government.<sup>23,24</sup>

2. Where a taxing power is thus conferred by a State Legislature upon a local or municipal authority, it does not mean that the State Legislature loses its power to impose a tax on the same subject-matter as long as the authorisation in favour of the local authority subsists or that the same subject-matter cannot be taxed both by the State Legislature and the local or municipal authority. There is no such bar in the Constitution.<sup>1</sup> Thus, a tax on entertainments or on property may be constitutionally levied both by a State Legislature as well as by a local body authorised by it for purposes of local self-government.<sup>2</sup>

3. The Entry also includes the ancillary power of providing for the election of local authorities and for the settlement of disputes arising thereof.<sup>3</sup>

20. *Seshadri v. Second Addl. I. T. O.*, A. 1954 Mad. 806.

21. *Chakko v. State of Orissa*, A. 1956 Orissa 7.

22. *Manyamma v. Municipal Commr.*, A. 1959 A.P. 271.

23. *Hirabhai v. State of Bombay*, A. 1955 Bom. 185 (187).

24. *Ajoy v. Local Bd.*, A. 1959 Assam 221.

25. *Calcutta Corpn. v. Saraf*, A. 1959 Cal. 703 [Das Gupta C.J., however, held that the Legislature cannot confer upon the local authority the power to determine the rate of a tax, since that is a power which must be exercised by the Legislature itself. It is submitted that that view overlooks the language of Entry 5 which empowers the State Legislature to determine the 'powers' of local authorities without any limitation. The power to impose a tax can then be conferred by the Legislature in favour of a local authority, by virtue of the Constitution, without coming into conflict with the principle against delegation to an administrative authority].

1. *Cantonment Board v. W. I. Theatres*, A. 1954 Bom. 261 (265).

2. *Veerafu v. Dt. Munstf.*, A. 1957 Andhra 393.

## 6. Public health and sanitation ; hospitals and dispensaries.

### 'Public health'.

1. Under this Entry (read with Entry 1 of List II), the State Legislature is competent to prohibit or control the use of amplifiers to the detriment of public health and tranquillity even though the amplifiers themselves are instruments of broadcasting and the manufacture or control of ownership of such instruments would fall under Entry 31 of List I.<sup>3</sup>

2. Protection against fire will come either under Entry 5 or under the present Entry.<sup>4</sup>

## 7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

### 'Intoxicating liquor'.

The words 'intoxicating liquor' in item 31 of List II of the Government of India Act, 1935 (Entry 8 of List II of the Constitution) cover not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol,<sup>5</sup> which may be used as their substitutes.

### 'That is to say'.

These words show that the words 'production etc.' which follow are merely illustrative and not words of limitation. By reason of these words, the entire field of legislation on the subject of intoxicating liquors, including prohibition, belongs exclusively to the State Legislature.<sup>6</sup>

### 'Possession and sale'.

The words 'possession and sale' occurring in Item 8 of List II of the Government of India Act, 1935 must be read without any qualification (having no reference to import or export) and the word 'import' in item 41 of List I standing by itself will not include either sale or possession of the article imported into the country. There is thus no conflict between the two items (i.e., between Entries 8 of List II and 41 of List I) of the Government.<sup>7</sup>

### 'Prohibition'.

1. The power to legislate with respect to intoxicating liquors and narcotics includes the power to introduce partial or total prohibition.<sup>8</sup> The words "that is to say, the production, manufacture . . ." are explanatory or illustrative words, and not words either of amplification or limitation.<sup>9</sup> The right to legislate as to possession of intoxicating liquors necessarily involves a right to prohibit possession.<sup>8</sup>

2. A statute relating to prohibition of intoxicating liquor can widely regulate the manufacture, sale and consumption of allied pro-

3. *State of Rajasthan v. Chawla*, A. 1959 S.C. 544.

4. *Callex Ltd. v. Director*, A. 1960 Cal. 219 (222).

5. *State of Bombay v. Balsara*, (1950-51) C.C. 308 : (1951) S.C.R. 682.

6. *Bhola Prasad v. S. C. R. Emp.*, A. 1942 P.C. 17.



ducts like medicinal preparations, not for the purpose of interfering with the rights of citizens to acquire, hold or dispose of them, but for preventing them from being diverted from their purpose and utilised for defeating the provisions of the law relating to prohibition.<sup>7</sup>

#### No conflict with Entry 41 of List I.

There is no conflict between the present Entry and Entry 41 of List I and that the right of the State Legislature to prohibit the possession, purchase and sale of intoxicating liquor includes *foreign or imported* liquor as well. The words 'possession and sale' in the present Entry are to be read without any qualification whatsoever.<sup>8</sup>

#### 9. Relief of the disabled and unemployable.

10. Burials and burial grounds ; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.

#### 'Education'.

The present Entry gives the residuary power over education and Universities to the States, subject to the exceptions specified in the Entry itself. These exceptions are—(i) Universities mentioned in Entry 63, List I; (ii) Institutions of national importance (Entry 64, List I); (iii) Union agencies for professional education, etc. (Entry 65, List I); (iv) Co-ordination and determination of standards (Entry 66, List I); (v) Vocational and technical training of labour (Entry 25, List III).

12. Libraries, museums and other similar institutions controlled or financed by the State ; ancient and historical monuments and records other than those declared by *or under law made by*<sup>9</sup> Parliament to be of national importance.

**Amendment.**—The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49, *ante*.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I ; municipal trainways ; ropeways ; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways ; vehicles other than mechanically propelled vehicles.

#### 'Communications'.

Means of communication excepted from the present Entry are those included in Entries 22-25, 30-31 of List I ; 32, 35 of List III.

7. *Nageswara v. State of Madras*, A. 1954 Mad. 643.

8. *State of Bombay v. Balsara*, A. 1951 S.C. 318.

9. Inserted by the Constitution (Seventh Amendment) Act, 1956.

Reading all these entries together, the division of the power over 'communications' may be explained thus :

Union.	State	Concurrent.
Railways (Entry 22, List I); 'National highways' (Entry 23, List I); Shipping and navigation by mechanically propelled vehicles on inland waterways declared to be 'national waterways' (Entry 24, List I); Maritime shipping and navigation, including shipping and navigation in tidal waters (Entry 25, List I); carriage of passengers and goods by railway, sea or air or by national waterways in mechanically propelled vehicles (Entry 30, List I); Posts and Telegraphs, telephones, wireless, broadcasting and other 'like' forms of communication (Entry 31, List I).	Roads, bridges, ferries, municipal tramways, ropeways, inland waterways other than 'national waterways' and traffic thereon by vehicles other than mechanically propelled vehicles; other means of communication not specified in List II (Entry 13, List II).	Shipping and navigation on inland waterways (other than 'national waterways') by mechanically propelled vehicles and carriage of passengers and goods on such waterways (Entry 32, List III); mechanically propelled vehicles (Entry 35, List III).

**'Municipal tramways'.**

The Entry is wide enough to authorise a Municipal tramway to fix and charge fares.<sup>10</sup>

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

**'Preservation, . . . improvement of stock'.**

This power enables the State Legislature to make a law to implement the directive contained in Art. 48 to prohibit the slaughter of milch and draught cattle.<sup>11a</sup>

The present Entry is thus wide enough to cover—

(i) Land reform and alteration of land tenures;<sup>12</sup> but not 'acquisition' of land which is included in Entry 42 of List III,<sup>13</sup> or transfer of property other than agricultural land, which is included in List III, Entry 6<sup>14</sup>. It is permissible, under this Entry, to expand the rights of tenants or the lands available for cultivation by tenants, by limiting the extent of lands in the possession of landowners;<sup>15, 16</sup> or to provide for the cancellation of leases made not in the normal course of manage-

10. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

11. *Sudhir Chandra v. Calcutta Tramways*, A. 1960 Cal. 396.

12. *Megh Raj v. Alla Rakhia*, A. 1947 P.C. 72.

12a. *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

13. *Atma Ram v. State of Punjab*, A. 1959 S.C. 519 (522).

14. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (283), affirming *Kameshwar v. State of Bihar*, A. 1951 Pat. 91 (96).

15. *Mangtulal v. Radhashyam*, A. 1953 Pat. 14 (22).

16. *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (463).



ment but in anticipation of legislation for the abolition of intermediaries;<sup>17</sup> transfer to tenants in possession, by way of compulsory purchase, of all lands not required by the landholders for their personal cultivation.<sup>18</sup>

(ii) Settlement of disputes relating to land as well as determination of jurisdiction of Courts in respect of land (as ancillary matters),<sup>19, 20</sup> including stay of suits or other proceedings relating to such disputes.<sup>21</sup>

(iii) Prevention of encroachments on public lands, and removal of such encroachments.<sup>22</sup>

(iv) Restriction or extinction of existing interests in land, including provision for the statutory purchase<sup>23</sup> by tenants of lands belonging to the landlord.<sup>24</sup>

(v) Consolidation proceedings relating to several parcels of land.<sup>25</sup>

*Acts coming under this Entry.*—Bihar Preservation and Improvement of Animals Act, 1956; Uttar Pradesh Prevention of Cow Slaughter Act, 1955; C. P. and Berar Animal Preservation Act, 1949.<sup>26</sup>

16. Pounds and the prevention of cattle trespass.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

#### 'Land'.

1. The earlier portion of the entry is not restricted to agricultural land, but includes all species of land.<sup>27</sup>

2. The words 'rights in or over land' confer very wide powers.

#### Whether 'land' includes 'buildings'.

The Nagpur, Bombay and Allahabad High Courts are of the opinion that<sup>28, 29</sup> 'land' includes houses and buildings. According to this view, control of letting and accommodation of premises would be caused by the present Entry.

The Patna<sup>3</sup> and Rajasthan<sup>2</sup> High Courts, on the other hand, hold that 'land' cannot be so widely interpreted.

#### 'Rights in or over land'.

'Rights in land' include general rights like full ownership or leasehold or all such rights. 'Rights over land' include easements or other collateral rights whatever form they might take.<sup>3</sup>

17. *Raghubir v. State of Ajmer*, A. 1959 S.C. 475 (477).

18. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (15).

19. *Laxminarayan v. Chhotu*, A. 1957 M.B. 62.

20. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (16).

21. *Atma Ram v. State of Punjab*, A. 1959 S.C. 519 (523).

22. *State of Punjab v. Kehar Singh*, A. 1959 Punj. 8.

23. *Manohar v. Desai*, A. 1951 Nag. 33 (35-6); *Mangilal v. State of M. P.*, A. 1955 Nag. 153 (156).

24. *Patel v. Viswanath*, A. 1954 Bom. 204.

25. *Raman v. State of U. P.*, A. 1952 All. 703.

1. *Mangilal v. Radhashyam*, A. 1953 Pat. 14.

2. *Mllap v. Dwarka*, A. 1954 Raj. 252 (255).

3. *Megh Raj v. Alla Rakhia*, A. 1947 P.C. 72.

**'Landlord and tenant'.**

The words are wide enough to include an ex-landlord and an ex-tenant.<sup>4</sup>

**'Collection of rents'.**

These words confer power upon the State Legislature to legislate with respect to *remission* of rents as well as their collection or *recovery*. e.g., to provide that decrees for rent shall be executed only in some particular manner.<sup>5</sup>

**Transfer and alienation of agricultural land.**

While the preceding matters of the entry relate to both agricultural or non-agricultural land, the exclusive power of the Provincial Legislature to deal with transfer of land is confined to agricultural land, for transfer of property other than agricultural land is a concurrent subject under List III (Entry 6). A State law relating to transfer of agricultural land may override the provisions of the Transfer of Property Act,<sup>6</sup> say, as to mortgages of agricultural land.<sup>7</sup>

**'Agricultural Land'.**

This expression is used in a general sense, to include not merely the raising of grain or food crops but also gardening, horticulture or pasture.<sup>8</sup>

**Entries 18 and 65 of List II.**

The words of Entry 18 are comprehensive enough to include the remedial as well as the *procedural* provisions concerning the reliefs in respect of the several rights and liabilities enumerated in this Entry. Of course, there is a separate Entry for 'Civil Procedure' (4 of List III), but there civil procedure is used in a general sense as the procedure applicable to litigation *generally*; it does not include a special law of procedure which is applicable only to a litigation regarding a special matter.<sup>9</sup> Entry 65 is wide enough to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of Entry 18.<sup>10</sup>

**19. Forests.**

A State Act which has for its object the preservation of forests, defined a forest as including land recorded in the record-of-rights as 'forest' or jungle land. *Held*, the legislation was, in its pith and substance, one under Entry 19 of List II and not under Entry 18 of List II relating to land.<sup>11</sup>

**20. Protection of wild animals and birds.****21. Fisheries,****'Fisheries'.**

1. The present Entry would give the legislative power over fisheries in inland and territorial waters to the State, while the legis-

4. *Bhuty v. Radhakisanlal*, A. 1956 Nag. 50 (52); *Subrahmanya v. Dharmalinga*, A. 1958 Mad. 608 (615).

5. *United Provinces v. Atiga*, A. 1941 P.C. 16 (25); *Uday Chand v. Samarendra*, (1947) 82 C.L.J. 1 (F.C.).

6. *Paramananda v. Sankar*, (1950) D.L.R. 31 (33) Cuttack.

7. *Cf. Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 523 (528) P.C.

8. *Cf. Bir Bigram v. Tafsaral*, (1942) 46 C.W.N. 999 (1002, 1006); *Uday Chand v. Samarendra*, (1947) 82 C.L.J. 1 (F.C.).

9. *Durgaji v. State of Bihar*, A. 1953 Pat. 65.



lative power over right of fishing beyond territorial waters belongs to the Union under Entry 57 of List I.

2. This includes the power not only to regulate fishing but also to prohibit fishing altogether in particular places or at particular times.<sup>10</sup>

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

#### Regulation of Mines.

1. This Entry gives the State Legislature the power to legislate as regards regulation of mines and mineral development, subject to laws made by the Union under Entry 54 of List I. Thus, there is nothing to prevent a State from legislating on matters on which the Indian Mines Act, 1923 is silent.<sup>11,12</sup>

2. Under the present Entry, the State Legislature is entitled to prescribe the rates of royalty for minerals allowed to be regulated by the State Governments by the Mines and Minerals (Regulation and Development) Act, 1948.

24. Industries subject to the provisions of entries 7 and<sup>13</sup> 52 of List I.

#### Amendment.

The words 'entries 7 and 52' have been substituted for the word 'entry', by the Constitution (Seventh Amendment) Act, 1956, in order to remove an obvious lacuna, for, the Union power relating to industries is contained not only in Entry 52 but also in Entry 7 of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

#### 'Trade and commerce within the State'.

Under the present Entry, the State Legislature can—

(a) Provide for the fixation of a minimum price payable to cultivators of jute, authorise the Government to control stocking of raw jute and make it compulsory to enter into contracts for the sale of raw jute only through a Jute Board constituted under the Act. Such legislation is not *ultra vires* even though it may have some indirect effect upon export of raw jute in certain cases [Entry 41 of List I].<sup>14</sup>

(b) Regulate the dealing of goods in 'futures', that is, contracts relating to the sale or purchase of goods made on a forward basis.<sup>15</sup>

(c) Regulate the hours, place, date and manner of sale of any particular commodity or commodities.<sup>16</sup> It could, for example, state that the sale of explosives or other dangerous substances should only be in selected areas, at specified times or on specified days when extra precautions for the general safety of the public and those directly con-

10. *United Provinces v. Atiga*, A. 1941 F.C. 16 (25).

11. *Periyannayakam v. Govt. of Mysore*, A. 1952 Mys. 84.

12. *Aluminium Corp. v. Coal Board*, A. 1959 Cal. 222.

13. Inserted by the Constitution (Seventh Amendment) Act, 1956.

14. *Alblon Jute Mills v. Jute Brokers*, (1953) 57 C.W.N. 541.

15. *Dani Chand v. Bhurwalha Bros.*, A. 1955 S.C. 182.

16. *Monohar Lal v. The State*, (1951) S.C.R. 671.

cerned could be arranged for. In the same way, it could say that there shall be no sales on a particular day or on days of religious festivals and so forth.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

**'Production, supply and distribution of goods'.**

1. Under the present Entry, the State Legislature has the power to restrict the *export* of essential commodities where such restriction is necessary for securing the maintenance or increase of the supply of such commodities, according to the doctrine of 'pith and substance'.<sup>17</sup>

2. Fixation of price is included within the present power.<sup>18</sup>

**'Goods'.**

By reason of the definition of Art. 366 (2), 'goods' includes both raw materials and finished products. But the raw materials and finished products specified in Entry 33 of List III are excluded from the scope of the present Entry.

28. Markets and fairs.

**Entries 28, 59 and 66.**

While the present Entry gives the State Legislature power to legislate on markets, Entries 59 and 66 (*post*) give the power with respect to tolls and fees respectively.<sup>19</sup>

29. Weights and measures except establishment of standards.

30. Money-lending and money-lenders; relief of agricultural indebtedness.

**'Money-lending'.**

A State law which, in its pith and substance, deals with money-lending, is not *ultra vires* if it incidentally affects promissory notes as security for loan.<sup>20</sup>

Similarly, a law providing for relief against agricultural indebtedness and dealing with the relation between agricultural debtors and creditors is, similarly, not *ultra vires* the Provincial Legislature on the ground that it incidentally affects negotiable instruments.<sup>20</sup>

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

**'Cinemas subject to the provisions of Entry 60 of List I'.**

It is clear from the above words that the general power to legislate with regard to cinemas is in the State Legislature and only a parti-

17. *Darshan Singh v. State of Punjab*, (1953) S.C.R. 319 (329).

18. *Venkatasubba v. Emp.*, A. 1945 Mad. 104.

19. *Haralal v. Dibrugarh Municipality*, A. 1958 Assam 156.

20. *Prafulla v. Bank of Commerce*, (1947) 51 C.W.N. 569 (608) P.C.



cular power is reserved for the Union Legislature in Entry 60 of List I, viz., the sanctioning of films for exhibition.<sup>21</sup>

Hence, the regulation and licensing of the storage of films would also come within the State power under the present power unless and until Parliament declares cinematograph films as a 'dangerously inflammable substance' by a law made under Entry 53 of List I,<sup>22</sup> and the West Bengal Fire Services Act, 1950 is accordingly, *intra vires* the Constitution.<sup>23</sup>

### 'Entertainments, amusements'.

These words in the present Entry as well as in Entry 62 of List II refer to objective sources of amusement or entertainment<sup>24</sup> offered by one person to another, and does not include the subjective satisfaction or pleasure which a person may derive from his own acts, e.g., from reading an amusing literature or by solving crossword puzzles. Of course, where an objective amusement is offered by one person to another, the Legislature may tax either the person who offers or the person who enjoys it, under Entry 62 (see *post*).

### 34. Betting and gambling.

#### 'Gambling'.

It includes any activity or undertaking whose determination is controlled or influenced by chance or accident and which activity or undertaking is entered into or undertaken with the consciousness of that risk,<sup>25</sup> e.g., 'prize competitions';<sup>26</sup> a wagering contract, such as a contract for the sale or purchase of goods at a given price at a future time, not intending an actual transfer of goods, but only to pay or receive the difference according as the market price varied from the contract price.<sup>27a</sup>

This Entry is wide enough to include all lotteries other than those organised by Government which come under Entry 40 of List I.<sup>28</sup>

*Acts coming under this Entry.*—W. B. Prize Competitions Act, 1955;<sup>29</sup> Prize Competition Act, 1955 (passed by Parliament under Art. 252).<sup>30</sup>

35. Works, lands and buildings vested in or in the possession of the State.

### 36. \* \* \*

**Amendment.**—Entry 36, which was as follows, has been omitted by the Constitution (Seventh Amendment) Act, 1956—

"Acquisition or requisition of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III."

See, further, under Entry 42 of List III, *post*.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

21. *De Luxe Film Exhibitors v. Corporation of Calcutta*, (1952) 7 D.L.R. 144 (Cal.).

22. *State of Bombay v. Chamarbaugwala*, (1955) 57 Bom. L.R. 288 (331); A. 1956 Bom. 1 (6).

23. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (710).

(23a) *Bullion & Grain Exchange v. State of Punjab*, (1960) S.C., [C.A. 1230/1955].

24. *J. N. Gupta v. State of W. B.*, A. 1959 Cal. 141.

25. *Chamarbaugwala v. Union of India*, A. 1957 S.C. 628.

1. Omitted by the Constitution (Seventh Amendment) Act, 1956.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services; State Public Service Commission.

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

**'Assessment of land revenue'.**

The State Legislature is competent, under this Entry, to assess land revenue in derogation of revenue-free grants previously made by the State.<sup>2</sup>

46. Taxes on agricultural income.

**Taxes on agricultural income.**

1. Even though Entry 19 of List II distinguishes 'forests' from 'agriculture' in Entry 14 of the same List, Entry 46 stands independent of either and would include a tax on income from forestry operations provided it falls within the definition of agricultural income in Art. 366 (1).<sup>2a</sup>

2. The jurisdiction of the State Legislature to legislate under the present Entry is limited by the definition of 'agricultural income' in Art. 366 (1), and the State Legislature cannot extend its own jurisdiction by adopting a wider definition of 'agricultural income'.<sup>3</sup>

47. Duties in respect of succession to agricultural land.

**'Succession duty'.**—See under Entry 88 of List I, *ante*.

48. Estate duty in respect of agricultural land.

49. Taxes on lands and buildings.

**Taxes on lands and buildings.**

1. The present Entry confers power upon the State Legislature to levy taxes on 'lands and buildings' without any terms of limitation as to the manner in which the tax is to be levied.<sup>4</sup> It is, therefore,

2. *Girijananda v. State of Assam*, A. 1956 Assam 33 (38, 46).

2a. *I. T. Commrs. v. Benoy*, A. 1957 S.C. 769 (772); (1958) S.C.R. 101.

3. *Prativa v. Agricultural I. T. O.*, A. 1958 Cal. 585 (586).

4. *Municipal Corporation v. Gordhandas*, I.L.R. (1954) Bom. 41 (52).



open to a Municipality under the present Entry, to correlate its tax to the real value of the open lands for the purpose of determining the rate or amount of the tax that should be levied upon them.<sup>5</sup> Hence, a municipal legislation which provides that the basis of valuation for the purpose of levying a tax on lands may be either capital or annual letting value is not *ultra vires*.<sup>6</sup>

2. A tax on building does not become a tax on income because it is levied on the basis of its annual value.<sup>6</sup> Similarly, a tax on holding is a tax under this Entry even though it is based on the annual value of the holding.<sup>7</sup>

3. A tax on land does not cease to be so because it is imposed upon property within a defined area or upon specified classes of property.<sup>8</sup>

4. A tax on land and building may be imposed either upon the occupier or upon the owner. It is not necessarily an 'occupation tax' in India.<sup>4</sup> A cess payable by an occupant of land, according to his land revenue assessment, would come under this Entry.<sup>9</sup>

5. The following taxes have been held to be covered by the present Entry—

(i) A 'market tax', being the license fee payable for holding a market on municipal land.<sup>10</sup>

(ii) A capital levy on agricultural land.<sup>11</sup>

6. On the other hand, it has been held that the scope of the present Entry is confined to the ownership of lands and buildings, and would not, accordingly, include—

A tax on the transfer and alienation of lands, such as the Gift tax.<sup>12</sup>

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics ;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

**Excise Duty** —See p. 705, *ante*. The powers conferred by Entries 51 and 54 being separate, there is nothing to debar the State Legislature to impose an excise tax and a sales tax on the same goods simultaneously.<sup>12, 13</sup>

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

5. *Byramjee v. Prov. of Bombay*, (1939) 42 Bom. L.R. 10 (47).

6. *Ralla Ram v. Prov. of East Punjab*, A. 1949 P.C. 81.

7. *Oudh Sugar Mills v. State*, A. 1960 All. 136.

8. *Leventhal v. David*, A. 1930 P.C. 129 (132).

9. *Habhuba v. State of Bombay*, A. 1959 Bom. 43.

10. *Ajoy v. Local Bd.*, A. 1959 Assam 221.

11. *Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 115 (117).

12-13. *Shree Dayal v. S. T. Commr.*, A. 1951 All. 838.

**Essential features of the tax under Entry 52 of List II : distinguished from 'terminal tax'.**

The essential features of the present tax are—(a) the entry of goods into a *definite local area*; (b) the goods must enter for the *purpose* of consumption, use or sale *therein*. Hence, the tax cannot be imposed under the present entry on goods merely passing *through*<sup>14</sup> that local area and having terminus elsewhere. But there is no limitation on the *manner* by which the goods to be subjected to the tax may enter into that local area.<sup>15</sup>

The tax referred to by the present Entry is (when levied by a local authority) commonly known as '*octroi*', i.e., a tax on goods brought into a place '*for sale, consumption or use*'.<sup>16</sup> It is to be noted that no such *purpose* restricts Entry 89 of List I, which relates to '*terminal tax*.' A terminal tax is a tax collected at the termini or outskirts of a local area, without reference to the purpose for which the goods enter that area. Entry 89 of List I, again, is limited by the words '*railway, sea or air*'. But in the present Entry there is no limitation on the *manner* in which the goods may enter; there is no ground for suggesting that the entry of goods by rail or air is any less contemplated by the present Entry than Entry by waterway or road. It follows that so far as rail-borne or air-borne goods are concerned, the same goods may well be subjected to taxation by the Union under Entry 83 of List I as well as to local taxation under Entry 61 of List II, but the grounds of taxation under the two Entries are *radically* different.<sup>17</sup>

2. Once the two conditions mentioned in the Entry are satisfied, the imposition comes under the Entry, whether it is termed a '*tax*' or a '*cess*'.<sup>18,19</sup>

3. The existence or non-existence of any provision for refunds is not an essential criterion of the tax under the present Entry.<sup>20</sup>

#### **'Local area'.**

Local area is any area notified by the Government and need not necessarily be a Government sub-division. Thus, a factory area notified by the Government may be a valid area for imposing a tax under the present Entry.<sup>21,22</sup>

53. Taxes on the consumption or sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers, *subject to the provisions of entry 92A of List I.*

**Amendment.**—The italicised words have been added by the Constitution (Sixth Amendment) Act, 1956.

#### **'Sale of goods'.**

1. What this Entry authorises is a tax on '*sale*' which means a '*transfer of property in the goods from the seller to the buyer, for a price*', subject to the conditions laid down by Art. 286 [see p. 516, *ante*].

2. This Entry confers power upon the State Legislature to tax

14. *Central India Spinning Co. v. Municipal Committee*, (1958) S.C.R. 1102 (1119).

15. *Punjab Flour Mills v. Prov. of Punjab*, (1947) 81 C.L.J. 417 (424) (F.C.).

16. *Ram Krishna v. Municipal Committee*, A. 1950 S.C. 11.

17. *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (241).

18. *Murl v. State of U. P.*, A. 1957 All. 159.

19. *Emp. v. Munna Lal*, A. 1942 All. 156.



sales of every kind, including the first sale by a manufacturer. Such tax would be a sales tax and not an excise duty.<sup>20,21</sup>

3. 'Sale of goods' is a composite expression and there is no sale of goods unless and until all the component transactions are completed.<sup>22,23</sup> The essential ingredients of a sale of goods are—(a) an agreement to sell movables, (b) for a price and (c) passing of property in the movables pursuant to the agreement.<sup>24</sup>

Firstly, a sale must be distinguished from an 'agreement of sale'. Under the present Entry, a State Legislature has no power to tax an 'agreement for sale'. Sale involves (i) an agreement for sale, i.e., an agreement to transfer the property in the goods to the buyer for a price, and (ii) an actual sale by which the property in the goods passes from the seller to the buyer.

(i) A bargain or agreement is an essential element of sale within the meaning of the present Entry, and involuntary sale would not come within its purview.<sup>25</sup>

(ii) An 'agreement for sale' becomes a 'sale' only when the property in the goods is actually transferred [s. 4 (4), Sale of Goods Act, 1930]. In short, while an agreement to sell is an executory contract, a sale is an 'executed' contract and it is the latter which is referred to by the present Entry.<sup>26</sup> A transaction in which the title to the property does not pass cannot be taxed under the present Entry.<sup>27</sup>

Hence, the present Entry does not extend to transactions of—

- (a) 'Forward contract'.<sup>28</sup>
- (b) Hire-purchase agreements with an option to purchase to the hirer.<sup>29</sup>
- (c) Use by the dealer himself from his stock of goods.<sup>3</sup>
- (d) Recovery of damages from a railway for loss of goods in transit.<sup>3</sup>

Secondly, payment or promise of payment of price is an essential ingredient of a sale. Price means money paid or promised as a consideration for the transfer of the goods. If the consideration be other than money, the transaction may be exchange or barter, but not sale.

Lastly, the transaction, in order to come under the present Entry, must relate to goods. Thus, a supply of labour and work cannot be said to be a sale of 'goods'.<sup>30</sup>

The agreement must relate to the very goods in which eventually property passes. There is no transaction of sale for the purposes of the present Entry where there is an agreement relating to one kind of property and in carrying out that agreement a transfer of title in another kind of property takes place.<sup>3</sup>

### Illustration.

1. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement and there is in such an agreement no contract to sell the materials used in the construction, nor does property pass thereon as movables but as an accretion to the building relating to which the agreement was made.<sup>3</sup> Hence, in a building

20-21. *Prov. of Madras v. Boddu Paddanna*, A. 1942 P.C. 33.

22. *Pappatlal v. State of Madras*, A. 1953 S.C. 274 (276).

23. *State of Madras v. Dunkerley*, A. 1958 S.C. 560.

24. *Budh Prakash v. S. T. O.*, A. 1952 All. 764, affirmed by Sales Tax Officer v. *Budh Prakash*, (1955) 1 S.C.R. 243.

25. *Instalment Supply Co. v. State of Delhi*, A. 1956 Punj. 177.

1. *Behubar Co. v. Commr. of Taxes*, A. 1957 Assam 61 (63).

2. *Newton v. The State*, (1952) N.L.J. 349.

contract, sales tax cannot be imposed either on the supply of labour or on the value of materials used in the construction.<sup>2</sup>

2. The same principle has been applied to indivisible contracts for the repair of machinery, e.g., a motor car.<sup>3</sup>

3. The meaning of the expression 'sale of goods' in the present Entry is not linked up with the meaning which that expression might bear for the time being in the Sale of Goods Act. It must be construed according to the true meaning that the expression has in law<sup>4</sup> (which is the same as in s. 4 of the Sale of Goods Act, 1930, as it stood when the present Entry was enacted) and this comprises the essential ingredients just stated.<sup>5</sup> In order to be *intra vires*, a taxing law under the present Entry must relate to a 'sale of goods', and the Provincial Legislature has no power to tax transactions which are not sales, by merely enacting that they shall be 'deemed to be sales'.<sup>6,7</sup>

#### Sales Tax on building contracts.

1. The conflict of judicial opinion on this subject has now been settled by the Supreme Court.<sup>8</sup>

It has been established that there cannot be a taxation under the present Entry unless the transaction sought to be taxed is a 'sale of goods' as explained above. It follows, therefore, that there cannot be any sales tax—

(a) On the value of material supplied in an indivisible building or 'works contract', because there was no agreement to sell the materials as such.<sup>9</sup>

Of course, if there are distinct and *separate* contracts,—one for the transfer of materials for money consideration and another for the payment of remuneration for services and for work done, a tax on the sale of materials cannot be questioned.<sup>10</sup> There is no such distinct contract where tenders were called for and received for executing works on a *lump sum*.<sup>11</sup>

(b) On the labour supplied by a contractor.<sup>12</sup>

2. So far as Union Territories are concerned, the Supreme Court has held that Parliament is competent to impose a sales tax on building contracts inasmuch as, while legislating by virtue of the power conferred by Art. 246 (4), Parliament is not fettered by anything in Entry 54 of List II or the implications thereof.<sup>13</sup>

#### 'Tax on sale'.

1. This power is not confined to a 'turnover' tax but also includes tax on retail sales. It means a tax upon the *event of a sale* or the *proceeds* thereof, whether taken individually or collectively.<sup>14</sup> It may also be imposed upon the gross receipts or turnover of a dealer from the sale of *specified commodities*.<sup>15</sup>

2. It may be imposed either on the seller or the buyer.<sup>16</sup>

3. It may be imposed on any person carrying on the business of

3. *State of Madras v. Dunkerley & Co.*, A. 1958 S.C. 560 : (1959) S.C.R. 379.

4. *Sundaram Motors v. State of Madras*, (1959) 2 M.L.J. 351 (357).

5. *Tata Iron & Steel Co. v. State of Bihar*, (1958) S.C.R. 1355 (1367).

6. *State of Madras v. Dunkerley & Co.*, (1959) S.C.R. 379 : A. 1958 S.C. 560; *Banarasi v. State of M.P.*, (1959) S.C.R. 427.

7. *Peare Lal v. State of Punjab*, (1960) S.C.R. 438.

8. *Mithan Lal v. State of Delhi*, A. 1958 S.C. 682 (685) : (1959) S.C.R. 445.

9. *In re C. P. & Berar Motor Spirit Taxation*, A. 1930 F.C. 1.

10. *Shiram v. Board of Revenue*, A. 1952 Nag. 378 (382).

11. *Syed Mohammad v. State of Andhra*, A. 1954 S.C. 314 (315).



sale or purchase, including a commission agent<sup>12</sup> but not a mere broker.<sup>13</sup>

4. A sales tax need not be an indirect tax. It may be imposed upon a seller without giving him an opportunity of recouping the amount of the tax from any other party, say, the consumer.<sup>14</sup>

5. If a law, in its 'pith and substance' relates to taxation of sale of goods, it may incidentally trench on items 7 and 8 of the Concurrent List without Art. 254 being attracted.<sup>15</sup>

#### Power to tax sale or purchase, subject to Art. 286.

The power to tax sale or purchase, conferred by the present Entry, is subject to the limitations imposed by Art. 286 (see p. 516, *ante*).

#### No bar against being retrospective.

1. A sales tax is a tax on the *transaction* of sale, it is not a condition for the validity of the tax that the seller must be in a position to pass on the tax to the purchaser or consumer.<sup>16,17</sup>

2. Consequently, the validity of the imposition of a sales tax with retrospective effect cannot be challenged on the ground that it is not possible for the sellers to pass on such tax to the consumers.<sup>18</sup>

#### Sales tax and excise duty.—See p. 705, *ante*.

55. Taxes on advertisements other than advertisements published in the newspapers.

56. Taxes on goods and passengers carried by road or on inland waterways.

#### 'Taxes on goods and passengers'.

1. The Bihar Finance Act, 1950, which imposes a tax on all passengers and goods carried by motor vehicles, is a legislation under the present power.<sup>19</sup> It has no necessary connection with transport for the purposes of trade and commerce.<sup>19,20</sup>

2. It is open to the Legislature to tax goods and passengers either individually or collectively.<sup>19,20</sup>

#### 'Goods'.—See Art. 366 (12), p. 641, *ante*.

#### 'Carried'.

1. It has no reference to the mode in which the goods are carried. The Entry is not limited to goods carried by a common or public carrier.<sup>19,20</sup>

2. Nor has it any reference to the purpose for which the goods are carried.<sup>19,20</sup>

12. *Radhakrishna v. Prov. of Madras*, A. 1952 Mad. 718 (F.B.).

13. *Commr. of S. T. v. Pandurang*, A. 1957 Nag. 61.

14. *Buchirajalingam v. State of Hyderabad*, A. 1958 S.C. 756 (759).

15. *Bengal Immunity v. State of Bihar*, A. 1953 Pat. 87.

16. *Tala Iron & Steel Co. v. State of Bihar*, A. 1958 S.C. 452 (463).

17. *Buchirajalingam v. State of Hyderabad*, A. 1958 S.C. 756 (759).

18. *Atma Ram v. State of Bihar*, A. 1952 Pat. 359.

19-20. *P. Barua v. State of Assam*, A. 1955 Assam 249 (S.B.).

*Acts coming under this Entry.*—Rajasthan Motor Vehicles Taxation Act, 1951;<sup>21</sup> s. 128 of the U. P. Municipalities Act, 1916.<sup>22</sup>

57. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads including tramcars subject to the provisions of entry 31 of List III.

58. Taxes on animals and boats.

59. Tolls.

#### 'Toll'.

This Entry authorises the State Legislature to levy a 'toll' which means a payment realised for some benefit, e.g., for the use of a market, or a bridge.<sup>23</sup> It is not essential that the toll should be collected prior to the rendering of the benefit. Thus, provided that it is not collected twice in respect of the same benefit, a toll may be collected from a trader either when he enters the market place or when he leaves it; or from a vehicle when it either enters into or leaves the limits of the Municipality which levies a toll for the use of its roads.<sup>24</sup>

60. Taxes on professions, trades, callings and employments.

#### Tax on trade.

1. A tax levied on the promoters of a gambling scheme, based on the entry fees, is a tax on gambling under Entry 62 and not a tax on trade.<sup>25</sup>

2. A tax imposed in exercise of the present power cannot be challenged on the ground that it is a tax on income within the meaning of Entry 82 of List I [see Art. 276, *ante*.].

3. The power conferred by this Entry is subject to the limitation imposed by A. 276 (2).

61. Capitation taxes.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

#### 'Luxuries'.

The use of the plural suggests that the tax that is contemplated is not a tax on an activity which may be considered as unnecessary and in that sense a 'luxury', but a tax on goods or articles which constitute luxuries,<sup>26</sup> e.g., tobacco.<sup>27</sup>

#### 'Entertainments'.

1. This word is not controlled by the word 'luxuries'. Hence, it would include entertainments like a cinema show, a dramatic performance or a cricket match.<sup>28, 29, 30</sup>

2. It cannot be contended that because the word 'cinema' is specifically mentioned in Entry 33 of List II and omitted from the present Entry, no tax can be imposed under the present Entry upon cinemas.<sup>31</sup> 'Cinema' had to be separately mentioned in order to make it clear that

21. *Automobile Transport v. State of Rajasthan*, A. 1958 Raj. 114 (119).

22. *Municipal Board v. Raghbir*, A. 1958 All. 430.

23. *State of Bombay v. Chamarbanglewala*, A. 1957 S.C. 699 (710).

24. *Abraham v. State of T. C.*, A. 1958 Ker. 129 (134).

25. *Western India Theatres v. Cantonment Board*, A. 1959 S.C. 582.

1. *Srinivasamurthy v. State of Mysore*, A. 1959 S.C. 895.



the power of the State Legislative to make laws with respect to cinemas was subject to item 60 of the Union List.<sup>2,18</sup>

3. The Entry does not draw any distinction between the person who derives the amusement and the person who caters it.<sup>19</sup>

#### **Tax on entertainments.**

1. The tax authorised by this Entry is a tax imposed in respect of the show, exhibition, performance or the like. It may be levied either upon the person who offers the entertainment or upon the person who enjoys it or on both.<sup>17</sup>

2. Where the incidence of the tax falls on the person who offers the entertainment, it does not become a tax on 'calling' or 'profession' within the meaning of Entry 60 of List II, if the tax is to be paid in respect of an entertainment (say, a cinema show) irrespective of whether it is given by a professional exhibitor or by one following a different calling, e.g., by a charitable society to raise funds for a charity,<sup>2,20</sup> and the tax is levied on each of the exhibitions, separately.<sup>2,21</sup> In such cases, what is taxed is not the calling of the person providing the entertainment but the entertainment itself.<sup>22</sup> And the question of applying Art. 276 (2) does not, consequently, arise in such cases.<sup>20</sup>

3. Where the levy is on each show or exhibition, the exhibitor has not to pay any tax if he holds no show. In such a case, it is the exhibition which is made liable to the tax and not the calling,<sup>21</sup> and Art. 276 is not attracted to it.<sup>21</sup>

#### **Tax on betting and gambling.**

A tax on the promoters of a gambling prize competition, being a percentage of the entry fees received, is a tax on betting and gambling and not a tax on 'trade' under Entry 60 of List II. The tax is levied on the promoter for the convenience of collection, with the expectation that he will indemnify himself at the expense of the gamblers.<sup>22</sup>

**'Betting and gambling'.**—See under Entry 34, List II, *ante*.

*Acts coming under the present Entry.*—S. 12 of the Bombay Lotteries and Prize Competitions Act, 1948.<sup>22</sup>

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

#### **'Duty in respect of documents'.**

The occasion for levy of the stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.<sup>23</sup>

64. Offences against laws with respect to any of the matters in this List.

#### **Offences.**

By reason of this Entry, the State Legislature may, while making a law pertaining to a tax on sale or purchase, provide for punishments in that law for non-compliance with the provisions of that law.<sup>24</sup>

2-18. *Srinivasamurthy v. State of Mysore*, A. 1959 S.C. 895.

19. *Aswathanarayana v. State of A. P.*, A. 1959 A.P. 461 (463).

20. *Kantilal v. Pallana Municipality*, A. 1955 Sau. 90.

21. *S. S. Enterprises v. State*, A. 1956 Punj. 203.

22. *State of Bombay v. Chamarbaugwala*, A. 1957 S.C. 699 (710).

23. *Cf. Sesharatnam v. Gift Tax Officer*, A. 1960 A.P. 115 (119).

24. *State of Mysore v. Ismail*, A. 1958 Mys. 143.

65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

**Jurisdiction of Courts with respect to matters in List II.**

The State Legislature has ample powers with regard to the jurisdiction and powers of Courts to deal with the species of property described in Entry 18 of this List.<sup>28</sup>

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

**'Fees'.**

1. This Entry gives power to the State Legislature to levy fees in most general terms in all matters which are within its legislative field. Thus, cess imposed by a State Legislature for purpose of controlling sugar can be treated as a cess under this Entry;<sup>1</sup> or a fee for keeping stalls in a market [Entry 28].<sup>2</sup>

2. But in order to come under this Entry, the imposition must be a fee for services rendered by the State relating to any of the subjects included in this List. Thus, if a Municipality maintains a burial ground [Entry 10, List II], it can levy a fee for every person buried in that burial ground;<sup>3</sup> if a State Government maintains an establishment for the inspection of factories, it may levy a fee on factories by way of realising the expenses involved.<sup>4</sup> But a 'fee' cannot be justified with reference to the general purposes of 'local government.'<sup>5</sup>

3. An imposition cannot be justified under this Entry when the authority fails to show that any services are being rendered which has a proximate relationship with the imposition.<sup>6</sup>

**List III—Concurrent List<sup>1</sup>**

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

**'Including all matters included in the Code of Criminal Procedure'.**

The word 'including' is a word of enlargement and not restriction. Hence, all matters included in the Code of Criminal Procedure at the date of commencement of the Constitution, whether they relate to procedure or to substantive right, would be a concurrent legislative subject.<sup>2</sup>

28. *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (S.B.).

1. *Emp. v. Munna Lal*, A. 1942 All. 156.

2. *Heralal v. Dibrugarh Municipality*, A. 1958 Assam 156.

3. *M. K. Mills v. Kishangarh Municipality*, A. 1960 Raj. 135 (137).

4. *Umalil Mills v. State of Rajasthan*, A. 1954 Raj. 178.

5. List III is not applicable to the State of Jammu and Kashmir.

6. *Narayanawami v. Inspector of Police*, (1948) 11 F.L.J. 43 (F.B.).



3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community ; persons subjected to such detention.

**'Reasons connected with'.**

These words imply that the connection between the reason for which preventive detention is sought to be prescribed and 'security of a State', 'public order' and the like must be 'real and proximate, not far-fetched and problematic'.

**'Maintenance of supplies and services'.**

Under the present Entry, preventive detention may be provided for the maintenance of either *supplies* essential to the community or *services* essential to the community or both.<sup>4</sup> It includes the maintenance of supply of *goods* or commodities essential to the community, even though 'supply of goods' is included in Entry 27 of List II.<sup>5</sup>

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

5. Marriage and divorce ; infants and minors ; adoption ; wills, intestacy and succession ; joint family and partition ; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

**Personal law.**

The Entry confers legislative power to enact laws, amend, alter or repeal the personal laws, in whole or in part.<sup>6</sup>

Agricultural lands are not excluded from the power relating to wills, intestacy and succession.<sup>7</sup>

6. Transfer of property other than agricultural land ; registration of deeds and documents.

**'Transfer'.**—This word would include partition of a joint family property.<sup>8</sup>

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

**'Not including contracts relating to agricultural land'.**

Thus, contracts between landlord and tenant for payment of rent in respect of agricultural land are excluded from this Entry, irrespective of the form in which such contract may be made.<sup>9</sup>

3. *R. v. Basudeva*, A. 1950 F.C. 67 (69).

4. *Dayanand v. State of Bihar*, A. 1951 Pat. 47.

5. *Jagannath v. State of Bihar*, A. 1952 Pat. 185 (188) F.B.

6. *Srinivasa v. Saraswathi*, A. 1952 Mad. 193.

7. *Laxmi v. Surendra*, A. 1957 Orissa 1 (5).

8. *Santhamma v. Neelamma*, A. 1956 Mad. 642 (650).

9. *Hulas Narain v. Deen Md.*, A. 1943 F.C. 9.

8. Actionable wrongs.
9. Bankruptcy and insolvency.
10. Trust and Trustees.
11. Administrators-general and official trustees.
12. Evidence and oaths ; recognition of laws, public acts and records, and judicial proceedings.

This Entry includes the power to define 'foreign judgments' and to provide for their enforceability.<sup>10</sup>

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

**'Including'.**

This word indicates that the Entry is not restricted to matters contained in the Code of Civil Procedure. Thus, it may include the procedure for disposal of *second* appeals.<sup>11</sup>

14. Contempt of court, but not including contempt of the Supreme Court.

15. Vagrancy ; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

17. Prevention of cruelty to animals.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

20. Economic and social planning.

21. Commercial and Industrial monopolies, combines and trusts.

22. Trade Unions ; industrial and labour disputes.

**'Industrial and labour disputes'.**

1. This Entry has a wide scope. It not only includes the power to legislate with respect to industrial disputes or disputes arising out of 'industry', but also any labour dispute, *i.e.*, dispute arising between employers and employees of any class,—even though the employers were not conducting an 'industry' in the usual sense of that word.<sup>12</sup> Hence, the Industrial Disputes Act is not *ultra vires* on the ground that it defines 'industry' as comprising both industrial and non-industrial concerns.<sup>13</sup>

2. Though the Union Parliament has no power to legislate on the powers of a Municipality (Entry 5, List II), it has power to legislate with respect to disputes between a Municipality and its employees, provided the legislation is, in its 'pith and substance', a legislation with respect to 'labour disputes'.<sup>14</sup> A Central Act relating to indus-

10. *Gauri Lal v. Jugal Kishore*, A. 1959 Panj. 265 (269) F.B.

11. *Sladamma v. Nanje*, A. 1952 Mys. 75; *Narayana v. Sankaranarayana*, A. 1953 T.C. 53.

12. *D. N. Banerjee v. P. K. Mukherjee*, (1953) S.C.R. 302 : (1952-54) 2 C.C.

13. *Niemla Textile Finishing Mills v. 2nd Punjab Tribunal*, A. 1957 S.C. 329.



trial disputes is not *ultra vires* on the ground that the power conferred by the Act to reinstate dismissed employees is in conflict with the power of appointment and dismissal belonging to the Commissioners under the Bengal Municipal Act. For, the Act deals with industrial disputes and not with local Government (Entry 5 of List II). The incidental encroachment is cured by the doctrine of 'pith and substance'.<sup>12</sup>

*Act coming under this Entry.*—Industrial Disputes Act, 1947.<sup>14</sup>

23. Social security and social insurance ; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

**'Welfare of labour including conditions of work'.**

1. This power includes the power to regulate the hours of work of persons employed in shops and commercial establishments and the power to close the shops on particular days.<sup>15</sup>

2. The Entry is wide enough to include industrial as well as non-industrial labour.<sup>16</sup>

*Acts coming under this Act.*—Bihar Shops and Establishments Act, 1953.<sup>17</sup>

25. Vocational and technical training of labour.

26. Legal, Medical and other professions.

**Ancillary power.**

Legislating under this Entry, Parliament is competent to prescribe the stamp duty payable on an application for enrolment as an advocate.<sup>18</sup>

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

**'Charities', 'Charitable institutions'.**

The additional words after 'charities' in this Entry are only illustrative of the directions which the power to legislate in respect of charities may take. The word 'charities' is a generic term of wide scope, including all public secular, charitable and religious trusts and institutions, recognised as such by the Indian law, and a power to legislate in respect of charities will include the power to legislate in respect of all matters connected with charitable and religious institutes and endowments,<sup>19</sup> e.g., the power to throw open the Hindu temples to all Hindus who had previously been excluded by custom or usage.<sup>20</sup>

14. *Co-op. Milk Societies v. State of W. B.*, A. 1958 Cal. 373 (376).

15. *Manohar Lal v. The State*, (1951) S.C.R. 671.

16. *N. T. F. Mills v. 2nd Punjab Tribunal*, A. 1957 S.C. 329 (339).

17. *Jugal Kishore v. Labour Commr.*, A. 1958 Pat. 442.

18. *Rupendra, In re*, A. 1957 Andhra 63 (S.B.).

19. *Manikkasundara v. Nayudu*, (1946) P.L.J. 57 : A. 1947 P.C. 1; *Gadadhar v. Prov. of Orissa*, A. 1950 Orissa 47.

*Acts coming under this Entry.*—Orissa Jagannath Temple (Administration) Act, 1954.<sup>20</sup>

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products ;

(b) foodstuffs, including edible oilseeds and oils ;

(c) cattle fodder, including oilcakes and other concentrates ;

(d) raw cotton, whether ginned or unginned, and cotton seed ; and

(e) raw jute.

**Amendment.**—The italicised words were added by the Constitution (Third Amendment) Act, 1954.

**Object of Amendment.**—This Entry has to be read with Entry 52 of List I, which empowers Parliament to vest the control of particular industries in the Union.

Entries 26 and 27 of Sch. II of the Constitution give exclusive power to the State with respect to 'trade and commerce within the State' and 'production, supply and distribution of goods' 'subject to the provisions of Entry 33, List III'. The result of this is that the exclusive power to legislate regarding intra-State trade and commerce and production, supply and distribution of goods belongs to the State Legislature, excepting such matters as are included in Entry 33 of List III. Now, in the original Entry 33 of List III, the only matter which was included was 'trade and commerce in, and the production, supply and distribution of—the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest in exercise of the power conferred on Parliament by Entry 52 of List I. By virtue of the power conferred by Entry 52 of List I, Parliament enacted the Industries (Development and Regulation) Act (LXV of 1951) declaring that the control of certain industries, specified therein, was expedient in the public interest. Hence, by the original Entry 33, only the products

20. *Bhimsen v. State of Orissa*, A. 1959 Orissa 17.



of those industries which are specified in similar Acts of Parliament as might be made under Entry 52 of List I were excluded from the exclusive legislative power of the State.

By means of the present amendment, the concurrent power which was given to Parliament for a temporary period with respect to the commodities mentioned in Art. 369, is placed on a permanent footing.

'Products'.—It means a finished product and not the raw materials required for production.<sup>21</sup>

'Foodstuff'.—This would include not only finished products, such as sugar, but also raw materials, such as sugarcane.<sup>22</sup>

*Acts coming under the present Entry.*—U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953;<sup>23</sup> Essential Commodities Act, 1955.<sup>24</sup>

#### 34. Price control.

##### Price Control.

It authorises the fixing of maximum as well as minimum<sup>25</sup> prices.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

##### 'Newspapers, books and printing presses'.

The power conferred by these words is wide enough to include the power to suppress the printing of 'objectionable matters' even though such legislation incidentally relates to 'public order'.<sup>26</sup>

40. Archaeological sites and remains other than those declared by or under law made by<sup>24</sup> Parliament to be of national importance.

**Amendment.**—The words in italics have been inserted by the Constitution (Seventh Amendment) Act, 1956, for the reasons explained under Art. 49 (p. 201, ante).

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

##### Evacuee property.

Since Entry 18 of List II is general, and the present Entry is specific, under the present Entry, Parliament has the power to pass a law providing for the management of evacuee property, including land, notwithstanding Entry 18 of List II,<sup>25</sup> and also an ancillary power necessary for the purpose of legislating upon taking possession, custody, and disposal of evacuee property,<sup>1</sup> including extinguishment of a mortgage.<sup>2</sup>

21. *Tika Ramji v. State of U. P.*, (1956) S.C.R. 393 (412).

22. *Cf. Secy. to Govt. v. A. G. Factory*, A. 1950 A.P. 538 (543).

23. *Shantilal v. State of Bombay*, A. 1954 Bom. 508.

24. Inserted by the Constitution (Seventh Amendment) Act, 1956.

25. *Sardara v. Custodian*, A. 1952 Pepsu 12.

1. *Sahib Dayal v. Asstt. Custodian*, A. 1952 Punj. 389; *Samsuddin v. Custodian*, A. 1953 Sau. 73.

2. *Raghubir v. Union of India*, A. 1954 Punj. 261.

## 42. Acquisition and requisitioning of property.<sup>3</sup>

**Amendment.**—By the Constitution (Seventh Amendment) Act, the present Entry has been substituted for the original Entry which was as follows—

"42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

**Object of Amendment.**—The object of the amendment has been thus explained—

"The existence of three entries in the legislative lists (33 of List I, 36 of List II and 42 of List III) relating to the essentially single subject of acquisition and requisitioning of property by the Government gives rise to unnecessary technical difficulties in legislation. In order to avoid these difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State List and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject."<sup>4</sup>

**Effect of Amendment.**—The effects of amendment of the present Entry are far-reaching :

(i) *Firstly*, while originally, the legislative power relating to acquisition and requisitioning was distributed by Entries in each of the three Legislative Lists, the Constitution (Seventh Amendment) Act, 1956 has omitted Entries 33 of List I and 36 of List II (see *ante*), and now only the concurrent Entry is available to either the Union or a State Legislature.

While previously, the substantive power to enact legislation with respect to acquisition and requisitioning was divided between the Union and State Legislatures according to the purposes for which such acquisition or requisitioning was to be made, now the entire field is left open to concurrent legislation. In other words, while previously, the State Legislature could not enact a law affecting acquisition or requisitioning for Union purposes, nor could Parliament authorise it for State purposes, it would now be possible for laws made by either Legislature to apply to the entire field, subject of course, to the usual limitations of local jurisdiction and the canons applicable to the concurrent power of legislation. Hence, a contention such as was raised in the case of *State of Bombay v. Gulshan*,<sup>5</sup> viz., that a State could not requisition or acquire property for the accommodation of consular representatives because that was a 'Union purpose', can no longer be raised after the amendment. Either the State or the Union Legislature will now be competent to requisition or acquire property, for any public purpose.

It should also be noted that the question in which Government property is to vest after the acquisition is also immaterial for the purpose of exercising the legislative power.<sup>6</sup>

*Secondly*, the original Entry 42 dealt with compensation and it was interpreted to act as a limitation upon the legislative power conferred by Entry 33 of List I or 36 of List II, in the sense that neither Legislature could provide as compensation something which was no compensation at all,<sup>6</sup> because the original Entry 42 laid down that the

3. Substituted by the Constitution (Seventh Amendment) Act, 1956.

4. Statement of Objects and Reasons.

5. *State of Bombay v. Gulshan*, (1955) 2 S.C.R. 867.

6. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (935-6).



Legislature must lay down the principles on which compensation was to be 'determined' and 'given'.

Thus, the doctrine of 'colourable legislation' came to be applied to the legislative power relating to 'acquisition' and 'requisitioning'. In subsequent cases,<sup>7</sup> it was made clear that the doctrine of colourable legislation was relevant only in connection with legislative competence and that it could be invoked only because the words of Entry 42 stood there as stated.

It follows, therefore, that the doctrine of colourable legislation can no longer be invoked to impeach a law relating to requisitioning and acquisition on the basis of Entry 42 of List III. It is, however, to be noted that the same words 'determined' and 'given' still exist in cl. (2) of Art. 31 and that even after the amendment of that clause by the Constitution (Fourth Amendment) Act, 1955, what the Court is expressly prohibited to do is to question the 'adequacy' of the compensation (see p. 175, *ante*). Hence, if a Legislature now provides that no compensation is to be paid for an acquisition under the Act, the law would obviously be void for contravention of the mandatory provisions of Art. 31 (2), (in cases to which that clause is still applicable). If, however, the Court adheres to the view that the doctrine of colourable legislation arises only in connection with legislative competence, the Court would be powerless to interfere, solely on the basis of Art. 31 (2), in a case where the compensation provided for is 'one farthing', for, that would not involve a direct contravention of Art. 31 (2). And the Court has already held that where *some* compensation has been provided for, even though grossly inadequate, no question of 'fraud on the power' arises.<sup>8</sup>

In any case, it is now made clear that the obligation to pay compensation is to be derived solely from Art. 31 (2) and not from any thing in Entry 42 of List III.

#### Scope of the Entry.

A law relating to acquisition will come under this Entry even though it relates to military property.<sup>9</sup>

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

#### Recovery in a State of claims arising outside that State.

The Entry does not require that the claim must arise only after the creation of the particular State which claims to recover it or after the commencement of the Constitution. The existence of the two States is necessary only at the time when the recovery is sought.<sup>10</sup>

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

'Inquiries'.—See under Entry 94 of List I, *ante*.

The present Entry empowers Parliament to make a law for inquiry for the purpose of any of the matters enumerated in List II even though Parliament cannot legislate with respect to such matters.<sup>11</sup>

7. *Gajapati v. State of Orissa*, (1954) S.C.R. 1: (1952-54) 2 C.C. 500; *Bhairabendra v. State of Assam*, (1956) S.C.A. 736.

8. *Vishveswar v. State of M. P.*, (1952) S.C.R. 1020.

9. *Sonabali v. State of Bihar*, A. 1957 Pat. 270 (274).

10. *Krishna Rao v. S. T. O.*, A. 1954 T.C. 518 (F.B.).

11. *Ram Krishna v. Tendolkar*, (1958) S.C.A. 754 (765).

*Acts coming under this Entry.*—Commission of Inquiry Act, 1952.<sup>11</sup>

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

**Jurisdiction of Courts other than the Supreme Court.**

See p. 711, *ante*. By reason of this Entry, read with Entry 5 of this List, both Parliament and a State Legislature have the power to legislate with respect to the jurisdiction and powers of a High Court relating to intestacy and succession.<sup>12</sup>

47. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

**Fees.**

Read with the preceding entries, the present Entry would authorise the imposition of the following fees, *inter alia*—

- (i) A fee for licensing of factories (read with Entry 36).<sup>13</sup>
- (ii) A fee for regulating religious and charitable institutions<sup>14</sup> (read with Entry 28).

## EIGHTH SCHEDULE

[Articles 344 (1) and 351]

### Languages

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
12. Tamil.
13. Telugu.
14. Urdu.

## NINTH SCHEDULE

[Article 31B]

- <sup>15</sup>[1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).

12. *In re Gordon*, A. 1959 Mys. 83.

13. *Cf. Umaid Mills v. State of Rajasthan*, A. 1954 Raj. 178 (181).

14. *Sudhindra v. H. R. E. Commr.*, A. 1956 Mad. 491 (503).

15. Added by the Constitution (First Amendment) Act, 1951, s. 14.



2. The Bombay Tenancy and Agricultural Lands Acts, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
5. The Panch Mahals Mehwasssi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).
6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay LX of 1950).
8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli.)
- <sup>16</sup>[14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).
15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).
16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).
17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).
18. The Railway Companies (emergency Provisions) Act, 1951 (Act LI of 1951).
19. Chapter III-A of the Industries (Development and

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16. Added by the Constitution (Fourth Amendment) Act, 1955, s. 5.

Regulation) Act, 1951 (Act LXV of 1951), as inserted by section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948, (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.]<sup>17</sup>

**Competence to amend Acts included in the Ninth Schedule.**

—See p. 153, *ante*.

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17. In its application to the State of Jammu and Kashmir, the following entries shall be added:—

- "21. The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of 2007).
22. The Jammu and Kashmir Restitution of Mortgaged Properties Act (No. XVI of 2006).
23. The Jammu and Kashmir Tenancy Act (No. II of 1980).
24. The Jammu and Kashmir Distressed Debtors Relief Act (No. XVII of 2006).
25. The Jammu and Kashmir Alienation of Land Act (No. V of 1995).
26. Order No. 6-H of 1951, dated 10th March, 1951 regarding Resumption of Jagirs and other assignments of Land Revenue etc.
27. The Jammu and Kashmir State Kuth Act (No. I of 1978.)"



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**CORRIGENDUM**

- P. 658...For item '4. Bombay', *substitute* '8. Maharashtra'.  
For item '5. Gujarat', *substitute* '4. Gujarat', and  
renumber the other items accordingly.





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